IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1791

ARTHUR ANDERSEN & CO.,

Petitioner,

v.

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Arthur Andersen & Co. ("Andersen"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 20, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, *infra*, pp. A1-A19. The two opinions of the District Court for the Eastern District of Pennsylvania, dated October 1, 1974 and April 17, 1975, appear in Appendix B, *infra*, pp. A20-A23 and Appendix C, *infra*, pp. A24-A32, respectively.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on April 20, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether refusal by the Court of Appeals to take jurisdiction of petitioner's appeal, on the theory that the collateral order doctrine is never applicable to any aspect of a class action determination, was error when the appeal presented a serious and unsettled question of professional impropriety by an attorney in his role as class representative.

2. Whether the District Court erred in concluding that an attorney was adequate to represent a class notwithstanding a flagrant record of professional impropriety in the commencement and prosecution of the suit, thus depriving petitioner of the certainty that a judgment on the merits in its favor would be *res judicata* as to the unnamed class members.

STATUTORY PROVISIONS AND RULES INVOLVED.

United States Code, 28 U. S. C. § 1291:

Final decisions of District Courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Federal Rules of Civil Procedure, Rule 23(a)(4):

Class Actions.

"(a) Prerequisities to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

STATEMENT OF THE CASE.

A. Preliminary.

This suit, a class action brought under the federal securities laws, was commenced by a Philadelphia lawyer, Mitchell Kramer, who named himself both as class representative and as counsel to the class. Because the underlying securities had been purchased jointly, Kramer also named his co-owner, David Harrison, as a party plaintiff. While Harrison assented to his role as a party plaintiff, he disclaimed any responsibility for prosecuting the suit as a class representative. For this reason, Harrison was treated by the Court of Appeals solely as a class member in its determination that Kramer was not qualified to act as class counsel because his interest as class counsel in recovering a potential award of counsel fees conflicted head-on with his interest as class representative in recovering only $219.07 in alleged damages.

Although the Court of Appeals readily accepted jurisdiction over petitioner's appeal involving the challenge to Kramer's qualifications to act as class counsel because the issue involved "a serious question of impropriety", it refused to accept jurisdiction in respect of petitioner's companion appeal involving the challenge to Kramer's qualifications to act as class representative, even though the conduct and ethical considerations underlying the one appeal were precisely the same as those underlying the other.

B. Facts.

1. The Filing of a Strike Suit.

On January 6, 1969, the two plaintiffs herein, Mitchell A. Kramer, Esquire, and David C. Harrison, Esquire, purchased as tenants in common 50 shares of the common stock of defendant Scientific Control Corp. ("Scientific").

The purchase was made with partnership funds, allegedly in reliance upon a company prospectus which had become effective on October 28, 1968 (Kramer 66a-67a; Harrison 98a, 108a-109a).[1] The stock was sold a month later, based upon Kramer's "personal 10% rule" that "if the stock dropped 10%, he [Kramer] would sell it automatically" (Marron 270a), and resulted in an aggregate net loss to the plaintiffs of $438.13 (Kramer 80a).

Between February 1969, when Kramer and Harrison sold their stock, and July 1971, the month before the complaint herein was filed, there were no developments which bear on this case: Kramer and Harrison had no financial interest in Scientific, and had "no official information pro or con, bad or good, about Scientific Control during that period" (Kramer 82a).

In July 1971, Kramer received a four-page Questionnaire in blank from the SEC requesting information about the Scientific shares which had been registered in plaintiffs' names (Kramer 81a; Second Amended Complaint, Exhibit A, 45a-48a). By this time, the partnership of Kramer and Harrison had dissolved and Kramer was in practice as a "sole proprietor" with one salaried associate, Robert M. Britton, Esquire (Kramer 57a; Harrison 124a). Rather than filling out and returning the Questionnaire to the SEC, Kramer decided instead to file suit immediately and instructed his associate to go to the local business library to consult Moody's "cut sheet" for a list of persons who could be named as defendants (Britton 234a; Kramer 72a-73a). Without any further investigation and without reference to any documents other than the prospectus and the "cut sheet", Kramer then instructed Britton to file a com-

1. References are to the depositions taken herein by name of deponent and the page number in the Appendix filed by Andersen in the Court of Appeals.

plaint in Kramer's and Harrison's names [2] containing allegations of a "general nature" that the prospectus "failed to disclose material misstatements and all that sort of thing" (Britton 201a, 235a-238a).

2. The Creation of a Conflict of Interest by Kramer in Naming Himself as Class Representative and in Having the Sole Associate in His Office Appear as Class Counsel.

In his complaint, Kramer not only named himself as a party plaintiff, he also had himself named as representative of a class comprised of all purchasers of Scientific stock from October 31, 1968 to November 21, 1969 (15a-16a).[3] Kramer did not name himself, however, as the attorney. Instead, he instructed Britton, his employee, to sign the complaint even though, at the time, Britton had been admitted to practice for scarcely a year and had had virtually no experience in securities litigation (Britton 244a). Kramer's reason, as it later developed, was to conceal (a) his conflicting interest as class counsel in a potential award of counsel fees far in excess of the $219.07 he sought in damages and (b) his conflicting obligation to withdraw from the case as class counsel because of his duty as class representative to testify on behalf of the class.

The Court of Appeals did not address the questions of "whether Kramer was the de facto attorney" or "the

2. Harrison had been solicited by Kramer to appear as a party plaintiff because of their joint ownership in the underlying securities (Harrison 101a, 123a, 129a).

3. Although Harrison gave Kramer "permission" to "use my name as one of the class representatives", he made it abundantly clear to Kramer that he himself wanted nothing to do with the prosecution of the suit and disclaimed any responsibility for its conduct, including the selection of counsel and payment of expenses, thus effectively eliminating himself as a *bona fide* representative of the class (Harrison 101a, 105a-107a, 113a, 123a, 129a, 134a; Appendix A, *infra*, p. A13).

motivations of Kramer as a plaintiff, as a class representative, or as an attorney-employer or attorney-partner of the attorney who formally appeared for the plaintiffs". Instead, it held that an "appearance" of professional impropriety in violation of Canon 9 of the Code of Professional Responsibility had been created by virtue of the appointment by Kramer of the sole associate in his office as class counsel.[4] Appendix A, *infra*, pp. A7, A14. The record makes it very clear, however, that Kramer was the *de facto* attorney in the case and that his efforts to create a false impression to the contrary involved him in an ever widening circle of deceit and professional impropriety.

3. Kramer's False Denials That He Was Ever the De Facto Attorney.

At his deposition, taken in January 1974, Kramer insisted that Britton, and later Kapustin, were and always had been the attorneys representing plaintiffs and the class —not himself. Thus (Kramer 74a):

> "Q. Now, when Mr. Britton worked for you prior to the filing of this lawsuit, I take it he was under your general supervision and control as an employee-lawyer?
>
> A. When he was working on my cases, or his cases, yes.
>
> Q. That would likewise apply to this lawsuit?
>
> A. No, it would not.
>
> Q. Why is that?
>
> A. Because we considered this his case as other cases that he brought into the office were.

4. When Britton left Kramer's employ on June 15, 1972, Kramer unilaterally discharged him as class counsel of record and replaced him with his (Kramer's) new associate, Stephen Kapustin (docket ##52, 53 at 4a).

> Q. Did he bring this case in?
>
> A. No. He brought it in the sense that I as a plaintiff came to him as an attorney and asked him to handle the case."

Continuing (*id.*, at 75a):

> "A. It was his case.
>
> Q. What do you mean by 'his case'? Did he have a proprietary interest in it?
>
> A. Yes, he handled the case. He was to get a fee, if there were any, on the case."

According to Kramer, Britton had agreed to represent him, and the class, in this protracted litigation with the understanding that he, Britton, would receive any counsel fees awarded by the Court (Kramer 61a-62a).

But the record, and particularly Britton's testimony, establishes to the contrary beyond any reasonable doubt: (1) that Kramer never told or even hinted to Britton that the case was his throughout the entire period that Britton worked on it (Britton 207a, 209a-210a, 218a-219a, 222a-226a, 256a); (2) that there was nothing in writing on the subject even though it was Kramer's practice to reduce contingent fee arrangements to writing (*id.*, at 251a-252a); (3) that, in his own mind, Britton was acting as Kramer's employee, not as his attorney, when Kramer instructed him to prepare the complaint (*id.*, at 253a-254a); (4) that at the time the complaint was filed Britton didn't have any knowledge about how fees were determined in class actions (*id.*, at 256a); (5) that Britton's actual expectation was that if the case was settled he might "be in for a raise or a bonus of some kind" (*id.*, at 257a); (6) that when Britton left Kramer's office and was supplanted on the case by Kramer's new associate, Stephen Kapustin, Britton understood fully that the case was Kramer's, not his (*id.*, at

193a-194a); (7) that Kramer's construct of his fee arrangement with Britton was conveyed to Britton for the first time on the very eve of Britton's deposition, almost two years after Britton had left Kramer's employ (*id.*, at 223a-224a, 258a-263a); (8) that costs related to the suit, such as the filing of the complaint, service costs, and Britton's trip to Washington, D. C., were all paid for by Kramer's law firm out of firm assets (*id.*, at 197a-199a); (9) that Kramer's firm paid "all the overhead", including Britton's and Kapustin's salaries and the salaries of their secretaries (*id.*, at 187a; Kramer 96a); (10) that the complaint was filed in a backer bearing the firm name of "Kramer, Harrison and Bernstein" (docket #1 at 2a); (11) that all other papers filed by plaintiffs in this suit to and including March 6, 1974, are with but one exception in backers bearing the firm name of "Mitchell A. Kramer" (docket ##2, 17, 30, 34, 46, 48-49, 52-55, 61, 63 82 & 105 at 2a-7a); (12) that the papers filed by plaintiffs from March 6, 1974 to date are all in backers bearing the firm name of "Kramer and Salus" (docket ##112-113, 121, 129, 133-134, 137-148, 151-164, 167, 170-171, 178-179, 183 & 196 at 7a-10a); (13) that Kramer's partner, Herbert A. Salus, Jr., has entered his appearance herein as counsel of record for plaintiffs (docket #162 at 8a); and (14) that all 49 letters addressed by plaintiffs to the Court and parties of record were written on stationary bearing Kramer's firm name (docket #202 at 10a).

The tempting news that Kramer had conveyed to Britton on the eve of Britton's deposition, that the case had been Britton's from its inception and during the entire period of his employment in Kramer's office and that Britton was therefore in line for an ultimate award of counsel fees, was nearly more than Britton could resist. Thus, with respect to the preparation of the original complaint, Britton at first was all braggadocio:

"I did what was necessary to get the complaint together. (189a)

". . .

"I developed—the facts, as claimed in the Complaint . . . . (196a)

". . .

". . . I made the appropriate allegations in the Complaint regarding class actions. (216a)

". . .

"I was handling the case entirely, I did everything on the case. (221a)

". . .

"I prepared the whole thing." (236a)

During a short recess, however, Britton experienced a "queasy feeling" about the strictures of Rule 11 of the Federal Rules of Civil Procedure and the glaring discrepancy between the "good ground" it requires as a condition to the signing of a complaint and the absence of any factual basis to support the allegations of fraud in the original complaint, and, upon the resumption of his testimony, placed full responsibility for the preparation and filing of the original complaint squarely on Kramer's shoulders. Thus (*id.*, at 243a-244a):

> "THE WITNESS: The first Complaint which was filed in the Summer of 1971, were conclusions that were made by Mitchell and were conveyed to me in my capacity as then-associate, and whatever you term it now, well, I mean, fine. But I was working for him at that time and he analyzed these things, I prepared the Complaint, but the Complaint was prepared in accordance with what I was told regarding the conclu-

sions of fraud after his analyzing these documents and me looking at them. It wasn't an independent decision to any extent on my part as to what conclusions these things led to. He analyzed these things, the prospectus and so forth, and asked me to file a Complaint. I was working as an associate and being paid on a weekly basis. He said, 'Let's file a Complaint,' and we filed—I don't want there to be—even any illusion to the possibility that I, independently, without proper justification—because I have a queasy feeling about this, came and filed a Complaint against your client or anybody else's client without very sufficient justification under Rule 11 or any other Rule. These conclusions were reached by Mitchell, who is an experienced attorney, who had experience in these areas, who analyzed these things, who came up with these conclusions that there was a fraud involved as a result of the bankruptcy, as a result of the prospectus, as a result of the Moody's information, and that these were the parties that were to be sued."

Continuing (*id.*, at 244a-245a):

"Finally, I acted as his attorney but under his guidance and direction. I just wanted to make that clear, that at the time the Complaint was filed, I had, for all practice [sic] purposes, six months' experience. The other six months—six months' experience with Mitchell. The other six months had nothing to do with this type of law and those conclusions were reached by Mitchell and those allegations were—the decisions regarding those allegations were reached by Mitchell in his capacity as an attorney. You can't separate the two. And the situation as it was back at that time was as you would picture it and I just don't want you or anybody else to have any misunderstanding regarding

that. He arrived at these—in all the analyzing of all these documents throughout the course of this thing, he helped me all along. I handled the preparing of the papers—but the nitty-gritty of the decisions regarding what was happening here, I obviously relied heavily on his experience in these particular things."

And finally (*id.*, at 245a-246a):

"The briefs and so forth I prepared entirely—almost entirely on my own although he may have read them over. The nitty-gritty as to what was wrong or what happened here was arrived at as a result of analyzing all of these documents which we've been talking about for the last couple of hours; and those decisions, unless I saw something in there, from my expertise, which was limited were arrived at to a large extent by Mitchell's expertise, which, from what he had told me, was unlimited.

"So I just wanted to clarify that, on the record, anything regarding Rule 11, I felt was justified because I was relying on sómebody who had an unlimited amount of experience and concluded quite affirmatively that there was something improper and something missing or a misstatement from the financial statements, and records, and so forth and so on.

"Okay. Does that pretty much cover it?

"Mr. Kapustin: Oh, yes."

Kramer was simply at a loss to explain why, if Britton really was the attorney for the class as Kramer claimed, Kramer had refused to let the case out of his (Kramer's) office when Britton left (Kramer 87a-88a):

"Q. Well, it was Mr. Britton's case. Why isn't it still his case?

Mr. Kapustin: Objection.

A. Because he is no longer in our law firm.
Q. Why didn't you let him take it with him?

Mr. Kapustin: Objection.

Q. (Continued.) You had given it to him, hadn't you?
A. Yes.
Q. Well, why didn't you let him take it with him?
A. I preferred to have somebody in the office.
Q. Why?
A. I don't know why."

And further (*id.*, at 89a-90a):

"Q. You have already stated that you want to keep the case in the office. Why?

Mr. Kapustin: I think I will have to object to that also.

Q. (Continued.) Answer the question.

Mr. Kapustin: And I direct him not to answer.

Q. (Continued.) Do you refuse to answer this question?
A. Yes.
Q. Well, the fact is, you want to keep control of the case, don't you, Mr. Kramer?

Mr. Kapustin: Objection.

Q. (Continued.) Answer the question, sir.

Mr. Kapustin: I direct the witness not to answer.

Q. (Continued.) You refuse to answer the question?
A. Yes."

As to Kramer's claimed interest in maintaining this suit at any personal cost to himself for a maximum recovery of $219.07 (Kramer 80a), Kramer testified: (1) that he had "no idea" what the cost of notice to the class might be (*id.*, at 64a); (2) that if the cost of notice should run to $200,000 he would pay it (*id.*, at 65a); and (3) that he had never asked Harrison to pay "any portion" of the costs (*id.*, at 60a). But Kramer, as noted, was also at a total loss to explain why, upon receipt of the SEC questionnaire, he had failed to fill it out or to cooperate in any way with the SEC in its investigation (*id.*, at 68a-69a, 71a-73a, 84a-85a).

4. The District Court Rulings and Petitioner's Appeals to the Court of Appeals.

On October 1, 1974, the District Court certified the action as a class action (Appendix B, *infra*, pp. A20-A23). Because discovery on Kramer's adequacy as a class representative had not been completed and because that issue had not been briefed or argued, petitioner moved for a reconsideration (docket #172). The motion for reconsideration was denied on April 17, 1975 (Appendix C, *infra*, pp. A24-A32) and petitioner filed its notice of appeal on May 16, 1975 (180a).

On June 20, 1975, petitioner moved in the District Court to disqualify Kramer and his firm as class counsel (docket #197 at 10a). That motion was denied on June 30, 1975 (277a), and petitioner filed its notice of appeal from that decision on July 9, 1975 (337a).

Both of petitioner's appeals were prosecuted under 28 U. S. C. § 1291 on the ground that the decisions of the District Court certifying Kramer as class representative and qualifying him as class counsel were "final" decisions under the collateral order doctrine enunciated by this

Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and applied by this Court to class determinations in *Eisen v. Carlisle & Jacquelin ("Eisen IV")*, 417 U. S. 156 (1974). Because of the close interrelationship between the issues presented on the merits, petitioner's two appeals were consolidated by the Court of Appeals for purposes of briefing and argument.

5. The Decision of the Court of Appeals.

In its opinion, the Third Circuit recognized that the class certification issue was closely "related" to the disqualification-of-class-counsel issue (Appendix A, *infra*, p. A6), in fact so closely related that had Andersen "won on that [the class certification] score . . . the disqualification [of class counsel] issue might never have surfaced" (*id.*, at A15). While the Third Circuit held that the disqualification-of-class-counsel issue was ripe for review under the collateral order doctrine because it was "too important to be denied review" (*id.*, at A5), and because it presented "a serious question of impropriety" (*id.*, at A5), the Court simply brushed aside the class certification issue on the basis of its rigid, and we submit, inconsistent position that no aspect of a class determination is ever appealable under the collateral order doctrine. Such decisions, the Court noted, may be appealed only if first certified for interlocutory review by the District Court pursuant to 28 U. S. C. § 1292(b), and only if the District Court's certification is thereafter found acceptable to the Court of Appeals. Thus (*id.*, at A4):

> "As we recently stated: '[T]his court has taken a strong position that a class certification decision, per se, is not an appealable final order under 28 U. S. C. § 1291. *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925 (1972). To qualify for interlocutory review in this circuit a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.) (in banc), *cert. denied*, 419 U. S. 885 (1974).' *Ungar v. Dunkin' Donuts of America, Inc.*, — F. 2d —, Nos. 75-1625/6 (3d Cir., Mar. 3, 1976). We will review class action certification decisions if the parties satisfy two conditions precedent, neither of which may be expected absent special circumstances—an order by the district court judge and permission from this court. 28 U. S. C. § 1292(b). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U. S. C. ∫ 1292(b)*, 88 Harv. L. Rev. 607 (1975). Here, appellant met neither of the conditions. Accordingly, we will grant appellees' motion to dismiss the appeal at No. 75-1673."

Continuing (*id.*, at A5-A6):

> "The appeal at No. 75-1849 stands on a different footing. Where a serious question of impropriety arises in the context of a motion to disqualify an attorney from proceeding to trial, this court has invoked the collateral rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Accordingly, we have held that district court orders denying such motions may be appealable under 23 U. S. C. § 1291. *Kroungold v. Triester*, 521 F. 2d 763, 765 (3d Cir. 1975); *American Roller Co. v. Budinger*, 513 F. 2d 982, 983 (3d Cir. 1975); *Greene v. Singer Co.*, 509 F. 2d 750 (3d Cir. 1971) (sur motion to dismiss appeal). We believe that the questions presented in the appeal at No. 75-1849 are '"'too important to be de-

nied review' and too 'independent of the cause' itself to require that appellate consideration be deferred" '. *Ibid.* at 751. We hold, therefore, that the order denying the motion to disqualify plaintiffs' counsel qualifies for immediate review." (Footnote omitted).

Turning to the merits of the appeal on the disqualification-of-class-counsel issue, the Court held that since an appearance of professional impropriety had been created when Kramer named himself as class representative and appointed his only associate as class counsel, it need not concern itself with whether any substantive impropriety had occurred (*id.*, at 7). In doing so, the Court declined to review, either in the context of Kramer's qualification to act as class counsel or, and more to the point in respect of the instant petition, his adequacy to act as class representative, any of the following questions of professional impropriety:

(1) Whether Kramer, as the *de facto* attorney, filed a complaint in federal court without good ground in violation of Rule 11 of the Federal Rules of Civil Procedure and DR7-102(A);

(2) Whether the suit was filed by Kramer as a strike suit for the purpose of obtaining counsel fees in violation of EC 7-4 and DR7-102(A)(2). Compare *Blue Chip Stamps, et al. v. Manor Drug Stores,* 421 U. S. 723, 740-743 (1975);

(3) Whether in naming himself as class representative and appointing himself as *de facto* class counsel, Kramer solicited employment from the unnamed members of the class in violation of Canon 2 generally, EC 2-4 and EC 2-8. Compare *Graybeal v. American Savings & Loan Association,* 59 F. R. D. 7, 14 (D. D. C. 1973); *Cotchett v. Avis Rent A Car*

System, Inc., 56 F. R. D. 549, 554 (S. D. N. Y. 1972); *Shields v. First National Bank of Arizona,* 56 F. R. D. 442, 444, (D. Ariz. 1971); *Shields v. Valley National Bank of Arizona,* 56 F. R. D. 448, 450 (D. Ariz. 1971);

(4) Whether Kramer solicited employment from Harrison after contacting him for the purpose of obtaining his joinder in a class action in violation of DR2-104(A)(5);

(5) Whether in maintaining this suit with firm funds, firm personnel and firm facilities, Kramer violated EC 5-8 and DR5-103(B). Compare *Bogus v. American Speech & Hearing Association,* — F. Supp. —, (Civ. No. 74-849, E. D. Pa., August 7, 1975);

(6) Whether in refusing to withdraw as class counsel after he had sworn under oath that he would testify as a witness on behalf of the class, Kramer violated DR5-101(B)(1)-(4) and DR5-102(A). Compare *Draganescu v. First National Bank of Hollywood,* 502 F. 2d 550 (5th Cir. 1974), *cert. denied,* 421 U. S. 929 (1975); *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.,* 239 F. 2d 555 (2d Cir. 1956), *cert. denied,* 355 U. S. 824 (1957); *Kriger v. European Health Spa, Inc. of Milwaukee, Wis.,* 56 F. R. D. 104, 105-6 (E. D. Wis. 1972);

(7) Whether in requiring an untrained and inexperienced lawyer to appear as counsel of record in a complex class action brought under the federal securities laws against 29 defendants, Kramer violated EC 1-2, DR2-103(A) and Canon 6 generally;

(8) Whether in denying under oath that he had ever acted as attorney *de facto,* and affirming under oath that he, as client, and Britton, as attorney, had reached a fee agreement at the outset of the case,

Kramer committed perjury or otherwise violated DR7-102(A)(5) and EC 8-5;

(9) Whether in having Kapustin convey to Britton on the eve of Britton's deposition a false account of the relationship that allegedly existed between Kramer and Britton while Britton was counsel of record, Kramer violated DR7-102(A)(7)-(8); and

(10) Whether in requiring counsel of record to communicate with the Court on stationery, and to file pleadings, all bearing his firm name, Kramer violated DR2-102(B)-(C).

REASONS FOR GRANTING THE WRIT.

I.

The Basis on Which the Court of Appeals Declined to Entertain Jurisdiction Over Petitioner's Appeal Is Contrary to This Court's Holding in *Cohen*, as Applied in *Eisen IV*, and Is in Conflict With Rulings of Other Circuits.

As noted, the Court of Appeals for the Third Circuit has adopted a mechanical rule of law which bars *any* early appeal involving *any* aspect of a class determination unless first certified by the District pursuant to 28 U. S. C. 1292(b) as an interlocutory order qualifying for immediate appeal and thereafter found acceptable for review by the Court of Appeals.

The Third Circuit's refusal to engage in an analysis of whether a class action decision can *ever* be a final collateral order appealable under § 1291 was in error. In *Eisen IV*, *supra*, at 169-172, this Court, after painstaking analysis, specifically concluded that the collateral order doctrine could and should be applied to class action rulings in order to determine whether those decisions are immediately appealable under § 1291. Thus (*id.*, at 169-170):

> "At the outset we must decide whether the Court of Appeals in *Eisen III* had jurisdiction to review the District Court's *orders permitting the suit to proceed as a class action* and allocating the cost of notice. Petitioner contends that it did not. Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the *orders* in question constituted a 'final' decision within the meaning of 28 U. S. C. § 1291 and were therefore appealable as of right under that section . . . . *Because we agree with*

> *the first ground asserted by respondents, we have no occasion to consider the second.*" (Emphasis added; footnote omitted).

Continuing (*id.*, at 172):

> "Like the order in Cohen, the District Court's judgment on the allocation of notice costs was 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' *id.*, at 546-547, and it was similarly appealable as a 'final decision' under § 1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action." (Footnote omitted).

The Third Circuit's dogged adherence to its ruling in *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir. 1972), *cert. denied*, 407 U. S. 925 (1972), which predated *Eisen IV*, simply rejects this Court's clear ruling in the latter case. Not every class action ruling by a district court will be immediately appealable under *Cohen*, but at least the Circuit Courts are required to apply the *Cohen* test in order to determine whether the decision is then appealable.

Despite *Eisen IV*, a clear split has developed among the Circuit Courts on the question of whether they are required to subject early appeals of class action decisions to the *Cohen* analysis. The Second and Eighth Circuits have taken the position that class action determinations appealed prior to final judgment must be exposed on an *ad hoc* basis to the *Cohen* standards when deciding whether

appellate jurisdiction exists. See *In Re Master Key Antitrust Litigation*, 528 F. 2d 5, 9-13 (2d Cir. 1975);[5] and *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F. 2d 213 (8th Cir. 1975), *cert. denied sub. nom. Cessna Aircraft v. White Industries*, 44 U. S. L. W. 3282 (Nov. 11, 1975). See also Judge Rosenn's concurring opinion herein (Appendix A., *infra*, p. A19), wherein he eschews an absolutist position by noting that a class certification order will not "usually" meet the *Cohen* test. By necessary implication, however, he is prepared to evaluate each such appeal in the light of *Cohen*.

On the other hand, the Third, Seventh and Ninth Circuits have absolutely refused to apply the collateral order doctrine when the appeal before them involves any aspect of a class action certification. See Appendix A, *infra*, and cases cited therein; *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973) (per curiam); and *Blackie v. Barrack*, 524 F. 2d 891 (9th Cir. 1975), petition for cert. filed (44 U. S. L. W. 3518).[6]

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5. In *Master Key* the Second Circuit described its approach as follows (*id.*, at 10):

> "We have not chosen to adopt a strict rule denying appealability for class action certification orders in all cases [citation omitted], recognizing that there may be 'exceptional circumstances' under which interlocutory review of such orders may be appropriate. (Footnote omitted.)

6. The Second Circuit noted this split between the circuit courts in *Master Key* as follows (*id.*, at 10, n. 8):

> "8. We note in passing that at least three circuits have taken the view that class action certification orders can never be appealable as 'final orders' under 28 U. S. C. § 1291. See *Blackie v. Barrack*, 524 F. 2d 891 (9th Cir. 1975); *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973) (per curiam); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925, 92 S. Ct. 2460, 32 L. Ed. 2d 812 (1972). See also *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F. 2d 314 (8th Cir. 1975). This is the view recommended for our circuit by Judge Friendly in his concurrence in *Parkinson v. April Industries, Inc.*, 520 F. 2d 650, 659-60 (2d Cir. 1975). The Ninth Circuit,

The recent decisions of the Tenth Circuit emphasize the need for a clear statement on this issue, for they flirt with both approaches, but do not conclusively establish which one they will follow. Compare *Hellerstein v. Mr. Steak, Inc.*, 531 F. 2d 470 (10th Cir. 1976), with *Seiffer v. Topsy's International*, 520 F. 2d 795 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 779 (1976).

The folly of the Third Circuit's wooden rule that the collateral order doctrine must not be applied to the District Court's class action decision in this case is revealed by the appellate court's expressed willingness to apply the very same doctrine to the very same facts when presented in the form of a motion to disqualify counsel.[7] *Eisen IV* specifically instructs all appellate courts that class action decisions are not immune from analysis under the collateral order doctrine, and it follows that the Third Circuit's decision to exalt its pre-*Eisen IV* ruling in *Hackett* over the ruling in *Eisen IV* involves an erroneous application of law and should be reversed.

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6. (Cont'd.)

in *Blackie v. Barrack, supra*, reasoned that the exceptional circumstances which justify review of a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), cannot be present in cases challenging class action certifications because effective review of the claim of improper certification can be had at the conclusion of the trial."

7. An even more bizarre result was reached by the Fifth Circuit in *Glenn v. Arkansas Best Corporation, et al.*, 525 F. 2d 1216 (1975) where the Court sidestepped its earlier rulings that disqualification-of-counsel issues are immediately appealable (See, *e.g.*, *Draganescu v. First National Bank of Hollywood, supra*, and *Uniweld Products, Inc. v. Union Carbide Corporation*, 385 F. 2d 992 (5th Cir. 1967), *cert. denied*, 390 U. S. 921 (1968)) and refused to entertain an appeal from the qualification of plaintiff, Glenn, as class counsel on the ground that the issue "was intrinsically the same as the challenge of Glenn as a representative of the Class under Rule 23" (*id.*, at 1217). The effect of this ruling makes the appealability of the denial of a motion to disqualify counsel turn upon the untenable distinction whether or not counsel purports to represent a class.

II.

The District Court's Decision Allowing Kramer to Proceed as Class Representative Is a Final Collateral Order Presently Appealable Under 28 U. S. C. § 1291 and Involves Ethical Considerations Which Require Exposition by This Court.

Andersen asserted before the Third Circuit that the District Court's determination that Kramer could proceed in this litigation as class representative was a final decision under 28 U. S. C. § 1291, and was therefore immediately appealable. The decisions of this Court on the issue of appealability under § 1291 establish that there are three questions to be answered in ascertaining whether a particular order constitutes a "final decision". They are: (1) whether the decision is final in the sense that it is not "tentative, informal or incomplete"; (2) whether the decision involves a collateral issue in the sense that it is separable from the "merits" of the claims upon which relief is sought; and (3) whether the issues presented for review are "serious and unsettled" questions, "too important" to be denied review. As this Court summed it up in *Cohen* (*supra*, at 546):

> "This decision appears to fall in that small class which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction".

That the decision of the District Court qualifying Kramer as class representative is neither tentative nor an ingredient of plaintiffs' cause seem too apparent to require

extended discussion. Since the District Court twice considered and twice upheld Kramer's role as class representative, its decision cannot be considered tentative, informal or incomplete.[8] Nor can it seriously be argued that a determination regarding Kramer's ability to represent the class has any effect upon the resolution of plaintiffs' Securities Acts claims against the defendants. The ruling in this regard is plainly no different than the order permitting Kramer to act as class counsel—an order consistently recognized to be collateral to the merits of the case. See Appendix A, *infra*, and cases cited therein.

The real focus here is upon the seriousness and importance of the issue presented for review and upon a weighing of the disadvantages of denying justice by delay against the disadvantages of piecemeal review.

1. The Seriousness of the Issue Presented for Review.

The starting point is, of course, the Third Circuit's explicit and emphatic recognition, as noted above, of the seriousness of the issue presented by Kramer's conduct. That seriousness stems from the fact that it involves the ethics of the bar, the interpretation and administration of those ethics by the judiciary, and the importance that such ethics have to the general public. Of crucial importance in this regard is the circumstance that Kramer, first and foremost, is an attorney and officer of the court. It makes no difference that the issue involves Kramer's role as class representative as opposed to his role as class counsel. As Kramer's associate, Britton, astutely observed, "You can't separate the two". Formal Opinion 336 of the American Bar Association's Standing Committee on Ethics and Professional Responsibility states:

8. The fact that the District Court's order was made in the context of a Rule 23 determination, which is subject to possible modification, does not require a different conclusion in this case any more than it did in *Eisen IV*.

> *"In regulating a lawyer's nonprofessional as well as professional conduci, the Code of Professional Responsibility charted no new course.* It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental, or public official. . . .
>
> As stated in E. C. 1-2, the 'public should be protected from those who are not qualified to be lawyers by reason of a deficiency in . . . moral standards.' *It would be utterly incongruous with the entire tenor of the code to find that its provisions regarding lawyers who engage in fraud, deceit, misrepresentation . . . do not apply to them when they are acting as individuals or as public servants."* (Emphasis added).

Accord: *Suffolk Roadways, Inc. v. Minuse*, 287 N. Y. S. 2d 965, 970 (1968); *60 Columbia St. v. Leofreed Realty Corp.*, 110 N. Y. S. 2d 417 (Sup. Ct., N. Y. Co. 1952), *aff'd. per curiam*, 120 N. Y. S. 2d 295 (App. Div. 1953).

The record below presents a dramatic albeit sorry illustration of the ethical complications and difficulties which must inevitably arise when a practicing attorney brings a lawsuit on his own, naming himself on the one hand as representative of a class of potentially thousands of unnamed plaintiffs, and appointing himself on the other hand as legal counsel to the entire plaintiff class without having ever met or spoken to one of them. We submit that the inevitable potential for such complications, and the concomitant public distrust of lawyers that such potential engenders, dictate adoption of an uncompromising rule of law forbidding the practice without qualification. It is submitted further that an outspoken opinion at the highest appellate level swiftly and resolutely announcing

such a standard would have particular relevance in the present climate of disrespect for lawyers and indeed for the judicial system as a whole.[9]

The importance of the issue is further underscored by the circumstance that in refusing to review Kramer's qualifications to act as a class representative concomitantly with its review of his qualifications to act as class counsel, the Court of Appeals effectively deprived itself of the opportunity to consider the appropriate remedy to be applied to Kramer's conduct when viewed as a whole. Disqualification of Kramer as counsel is an inadequate cure for his misconduct, as it leaves undecided the crucial question of whether such misconduct has disqualified him to represent the class which has been certified. The overwhelming weight of authority among the district courts supports the view that the more appropriate cure in the case of a plaintiff who files a complaint naming himself as class representative and class counsel is to refuse him class certification. See, *e.g., Kriger v. European Health Spa., Inc. of Milwaukee, Wis., supra; Shields v. First National Bank of Arizona, supra; Cotchett v. Avis Rent A Car System, Inc., supra;* and *Graybeal v. American Savings & Loan Association, supra. Accord: Turoff v. The May Company,* – F. 2d – (No. 75-1697) (6th Cir. 3/16/76). The underlying rationale of these decisions is that class actions should not be permitted to proceed when instituted by an attorney for improper and self-serving purposes. This remedy, rather than the mere disqualification of counsel, prevents the creation of onerous class litigation where none previously existed and reestablishes the *status quo* without prejudicing anyone's interests. See *American Pipe & Construction Co. v. Utah,* 414 U. S. 538 (1974). The

9. See, *e.g.,* Carrington, *The Ethical Crises of American Lawyers,* 36 Univ. of Pittsburgh Law Rev. 35 (Fall 1974).

Ninth Circuit articulated this rationale in *In re Hotel Telephone Charges,* 500 F. 2d 86, 91 (1974) as follows:

> ". . . . . In view of the nonexistent, or miniscule recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves. Considering that this action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not the individuals whose potential claims in any event are *de minimis* we find the Court's conclusion in *Berley v. Dreyfus* Co., 43 F. R. D. 397, 398 (S. D. N. Y. 1967) applicable here:
>
> '. . . we think that paragraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference-settling machinery. One method of achieving such economy is to avoid creating lawsuits where none previously existed. This is in part why "the extent and nature of any litigation . . . already commenced" is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason.'" (footnotes omitted).

It would serve no useful purpose to catalogue each respect in which the Code of Professional Responsibility has been violated in this case. Any one of them is more than sufficient to require the disqualification of plaintiffs as class representatives herein.

As stated in *Stavrides v. Mellon National Bank & Trust Company,* 60 F. R. D. 634, 636-7 (W. D. Pa. 1973):

> "The issue then becomes whether questions which seek to establish unethical conduct by plaintiffs' coun-

sel are relevant to the question of whether the class should be declared. Put another way, if defense counsel do discover unethical conduct can that that fact properly be used as a basis for an argument seeking denial of class action status?

"Although the cases on this subject are not legion, it it is apparent that unethical conduct by plaintiffs' counsel may result in a denial of the class action motion. Korn v. Franchard Corp., C. C. H. Fed. Sec. Law Reptr. ¶ 92,845 (S. D. N. Y. 1970). Taub v. Glickman, 14 F. R. Serv. 2d 847 (S. D. N. Y. 1970); Simon v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 16 F. R. Serv. 2d 1021 (N. D. Tex. 1972).

"These cases stand for the proposition that class action status should be denied where counsel's unethical conduct has been or is prejudicial to the interests of the class, or results in creating a conflict of interest between the attorney and the class and the attorney is, therefore, obviously unable to protect the interests of the class."

Continuing (*id.*, at 637):

> "We think that these cases are correct and that it is proper for courts to consider the ethical conduct of plaintiffs' counsel in deciding whether to certify a class. As the Third Circuit pointed out in Greenfield v. Villager Industries, Inc., 483 F. 2d 824 (3rd Cir., filed June 21, 1973) there is a unique relationship between the plaintiffs' counsel and the members of the class:
>
> > '. . . in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel posses, in a very real sense, fiduciary obligation to those not before the court."

And finally (*ibid*):

> "In assessing the ability of the plaintiffs' counsel to carry out his fiduciary duties to absent class members we think the court should use its 'broad administrative, as well as adjudicative power' as 'guardian of the rights of the absentees' to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them."

To require a lawyer to have a client before commencing class action litigation cannot have any adverse impact upon the public's ability to right wrongs. It will, however, have a deleterious impact on counsel's ability to commence such litigation, *sua sponte*, in the hope of generating large counsel fees for himself. If the class action device is available to an attorney without the restraining influence of a class representative whose individual interests are limited to a recovery of his own damages, it becomes an almost irresistible instrument for vexatious litigation because the lawyer, unlike the layman, is fully initiated into the power that the mere commencement of such a suit has to produce settlement without regard to the merits.

As Justice Rehnquist recently had occasion to observe in *Blue Chip Stamps, et al v. Manor Drug Stores, supra,* at 740:

> ". . . [I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved

against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit."

Continuing (*id.*, at 741):

"The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit."

And finally (*id.*, at 742-743):

"Obviously there is no general legal principle that courts in fashioning substantive law should do so in a manner which makes it easier, rather than more difficult, for a defendant to obtain a summary judgment. But in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proven so before trial, such a factor is not to be totally dismissed."

2. The Disadvantages of Denying Justice by Delay.

Permitting an attorney to act as class representative although he has engaged in unethical behavior by, *inter alia*, stirring up litigation, amounts to a judicial *imprimatur* upon that conduct which is readily perceptible to not only all of the other class members but to the general public. If it is improper for an attorney to do what Mr. Kramer did in this case—and Andersen strenuously contends that it is—an appellate court statement outlawing such conduct several years hence will not eradicate the unfavorable impression drawn by the class members and the public in the intervening years. In other words, the District Court's approval, and the Circuit Court's apparent approval, of Mr. Kramer's conduct spreads wider and deeper as each day passes, for as Chief Justice Burger had occasion to observe in an address to the American Law Institute (52 F. R. D. 211, 215):

"When a lawyer flouts the standards of professional conduct once, his conduct will be echoed in multiples for years to come and long after he leaves the scene."

Moreover, it is clear that there exists a real possibility that Andersen will suffer irremedial harm if Mr. Kramer is not removed from the role as representative plaintiff in this matter. The question is whether a final judgment rendered in this case with Mr. Kramer as class representative would

be entitled to *res judicata* effect in other courts in the future. In other words, if Andersen is successful on the merits of this case and has judgment entered for it and against the class of plaintiffs, would it still be possible for a dissatisfied class member to challenge the validity of that judgment against him on the ground that he had not been adequately represented in the proceeding? If that person were not adequately represented, it would be a denial of his due process rights to bind him by the resultant judgment. *Hansbury v. Lee,* 311 U. S. 32 (1942).

In *Gonzales v. Cassidy,* 474 F. 2d 67, 74 (5th Cir. 1973) the appellate court addressed this issue with the following comment:

> "As a general rule though, a judgment in a class action will bind the absent members of the class. The exception to this general rule is grounded in due process. Due process of law would be violated for the judgment in a class suit to be res judicata to the absent members of a class unless the court applying res judicata can conclude that the class was adequately represented in the first suit. Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1942). *See* Sam Fox Publishing Co. v. United States, 366 U. S. 683, 691, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961); Dierks v. Thompson, 414 F. 2d 453 (1st Cir. 1969); Eisen v. Carlisle and Jacquelin, 391 F. 2d 555 (2nd Cir. 1968); Mersay v. First Rep. Corp. of America, 43 F. R. D. 465 (S. D. N. Y. 1968)." (Footnote omitted).

Cf., *Sagers v. Yellow Freight Systems, Inc.,* 68 F. R. D. 686, 689 (N. D. Ga. 1975). See also *The Importance of Being Adequate: Due Process Requirements In Class Actions Under Federal Rule 23,* 123 University of Pennsylvania Law Review 1217 (May, 1975). As the Second Circuit

Court of Appeals noted in *Bersch v. Drexel Firestone, Incorporated,* 519 F. 2d 974, 996 (1975), *cert. denied,* 96 S. Ct. 453 (1975):

> "'. . . [I]f defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."

In sharp contrast to the serious harm which will occur if prompt appellate review is denied in this case, there can be no disadvantages of substance in permitting the immediate appellate consideration of the limited questions presented here. Petitioner's appeal, as noted, does not involve the appealability of class determinations as such, but rather one particular aspect of such a determination which, when addressed and settled with appropriate guidance from this Court, is never likely to surface again.

CONCLUSION.

The issue presented herein should have been subjected to a *Cohen* analysis by the Third Circuit, and if it had been the matter would have been found to be immediately appealable under § 1291, for the issue is a crucial one which cannot be fully rectified by reversal after final judgment. Thus, the damage involved if review is deferred far outweighs the one-time impact this case will have on the appellate courts if a prophylactic rule barring such conduct is established by this Court.

June 10, 1976.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1673 and 75-1849

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP.; ARTHUR ANDERSEN & CO.; H. L. FEDERMAN & CO.; W. C. BAKER; W. D. RAY; J. J. BONNESS; L. J. RATNER; NELSON McKINNEY; R. D. FREEDMAN; HAM SWYTER; R. T. GOWAN; D. A. W. YOUNG; I. C. DEAL and E. E. SPECKS; KLEINER, BELL AND CO., INC.; JOHN B. BAIRD; DONALD G. O'NEAL; NORMAN C. YOUNG; CLYDE WILLIAMS; VAN CALVIN ELLIS; H. L. FEDERMAN; PATRICK S. MARTIN; WILLIAM C. WEATHERFORD; HENRY W. HOOKER; MERRILL J. WHISTON; ARTHUR E. SPECKHARD; WILLIAM C. LEE; JOSEPH T. JONES and GEORGE JAGGERS

ARTHUR ANDERSEN & CO., *Appellant* in Nos. 75-1673 and 75-1849

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-1954)

Argued February 11, 1976

Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

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Opinion of the Court

(Filed April 20, 1976)

ALDISERT, *Circuit Judge.*

May a member of the bar who is a plaintiff class representative in a class action proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure designate as his counsel a member or employee of his law firm?

This is the question presented in the appeal at No. 75-1849 from an order denying appellant's motion to disqualify plaintiffs' counsel. Also raised, at No. 75-1673, is the issue whether the district court erred in certifying the class. F. R. Civ. P. 23(a), (c). We answer the first question in the negative; we do not reach the second, for want of an appealable order.

Mitchell A. Kramer and David C. Harrison, then law partners, purchased as joint tenants 50 shares of Scientific Control Corp. stock on January 6, 1969. They sold the stock one month later at a net loss of $438.13. During the summer of 1971, after Kramer and Harrison had dissolved their partnership, Kramer received a four-page questionnaire from the Securities and Exchange Commission requesting information on the transaction in Scientific Control stock. Kramer did not answer the SEC inquiry. Instead, after communicating with Harrison and receiving his permission, Kramer filed suit,[1] naming himself and Harrison as plaintiffs. The complaint named as defendants Scientific Control Corp. and certain officers and directors; H. L. Federman & Co., an underwriting firm; and Arthur Andersen & Co., the certified public accounting firm and appellant herein. Robert M. Britton, then an associate in Kramer's office, signed the complaint. Britton later moved to dismiss as to several named defendants, to add several defendants, and to amend the complaint; still later, he moved for a class action determination. Shortly before Britton left the employ of Kramer in July 1972, he withdrew as counsel and Steven Kapustin, then

1. The complaint as amended alleged claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the regulations thereunder, as well as common law claims predicated on pendent jurisdiction. *See Kramer v. Scientific Control Corp.*, 365 F. Supp. 780 (E. D. Pa. 1973) (district court opinion denying motions to dismiss).

replacing Britton as an associate but now a partner of Kramer, entered his appearance.

On October 1, 1974, the district court granted plaintiffs' deferred motion for a determination that the action proceed as a Rule 23(b)(3) class action. 64 F. R. D. 558 (E. D. Pa. 1974). On April 17, 1975, the district court denied a motion for reconsideration of its class action certification or, in the alternative, for a certification pursuant to 28 U. S. C. § 1292(b). 67 F. R. D. 98 (E. D. Pa. 1975). The appeal at No. 75-1673 followed; appellees have moved to dismiss this appeal for want of jurisdiction.

Two months later, on June 20, 1975, appellant moved the district court, *inter alia*, to disqualify plaintiffs' counsel because "[t]here exists an irreconcilable conflict of interest between the representation by Kramer & Salus [the firm in which Kapustin is now a partner] of the named plaintiffs and the members of the class purported to be represented by the named plaintiffs; 2. The Code of Professional Responsibility bars such representation . . . ." Appendix at 272a. The district court, treating the motion as one for reargument or reconsideration of its April 17th order and, as such, untimely, denied the motion. *Ibid.* at 277a. Appellant then noticed the appeal at No. 75-1849.

I.

As we recently stated: "[T]his court has taken a strong position that a class certification decision, per se, is not an appealable final order under 28 U. S. C. § 1291. *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925 (1972). To qualify for interlocutory review in this circuit a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.) (in banc), *cert. denied*, 419 U. S. 885 (1974)." *Ungar v. Dunkin' Donuts of America, Inc.*, — F. 2d —, —, Nos. 75-1625/6 (3d Cir., Mar. 3, 1976). We will review class action certification decisions if the parties satisfy two conditions precedent, neither of which may be expected absent special circumstances—an order by the district court judge and permission from this court. 28 U. S. C. § 1292(b). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U. S. C. § 1292(b)*, 88 HARV. L. REV. 607 (1975). Here, appellant met neither of the conditions. Accordingly, we will grant appellees' motion to dismiss the appeal at No. 75-1673.

The appeal at No. 75-1849 stands on a different footing. Where a serious question of impropriety arises in the context of a motion to disqualify an attorney from proceeding to trial, this court has invoked the collateral rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Accordingly, we have held that district court orders denying such motions may be appealable under 28 U. S. C. § 1291. *Kroungold v. Triester*, 521 F. 2d 763, 765 (3d Cir. 1975); *American Roller Co. v. Budinger*, 513 F. 2d 982, 983 (3d Cir. 1975); *Greene v. Singer Co.* 509 F. 2d 750 (3d Cir. 1971) (sur motion to dismiss appeal).[2] We believe that the questions presented in the appeal at No. 75-1849 are "'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred'". *Ibid.* at 751. We hold, there-

2. We do not hold that every ruling relating to conflict of interest by an attorney should activate the *Cohen* rule.[3]

3. "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept [a contrary] view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters." Borden Co. v. Sylk, 410 F. 2d 843, 846 (3d Cir. 1969).
Greene v. Singer Co., supra, 509 F. 2d at 751.

fore, that the order denying the motion to disqualify plaintiffs' counsel qualifies for immediate review.

II.

Having established our appellate jurisdiction to review the denial of the motion to disqualify, we now properly turn to the question of the scope of our appellate review. It has been said that a district court's decision to grant or deny such a motion may be reversed only for an abuse of discretion. *See Kroungold v. Triester, supra,* 521 F. 2d at 765 & n. 2. Recently, however, we observed that in many contexts disqualification motions present purely legal issues, subject to full appellate review. *American Roller Co. v. Budinger, supra,* 513 F. 2d at 985 n. 3. Once again, this possible discrepancy need not detain us here. As previously rehearsed, pages 3-4 *supra,* in this case the district court treated the motion to disqualify counsel as a motion to reconsider the class action certification decision. The issue on certifying plaintiffs as class representatives—whether they would "fairly and adequately protect the interests of the class", F. R. Civ. P. 23(a)(4), when their counsel was an employee (and later a partner) in Kramer's firm—was related, but not identical, to the issue posed by the disqualification motion. Reducing the distinction to its bare essentials, the former issue relates to who may serve as class representative, while the latter relates to who may serve as counsel. The trial court failed to perceive the difference and consequently erred.

III.

We take as our starting point Lord Herschell's remark to Sir George Jessel: "[I]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting

it." [3] From this has emerged what may be described as an axiomatic norm, if not a legal doctrine or conception,[4] *viz.*, that the appearance of conduct associated with institutions of the law be as important as the conduct itself. Indeed, this notion is at least an implicit predicate of the Code of Professional Responsibility,[5] drafted by the American Bar Association and implemented by the courts, including the United States District Court for the Eastern District of Pennsylvania,[6] to govern behavior of attorneys. The importance of this notion cannot be gainsaid. Canon 9 of the Code of Professional Responsibility, which Local Rule 11 in the district court made applicable to counsel, declares: "A lawyer should avoid even the appearance of professional impropriety." Canon 9 is case law in this court: "[A] court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance

3. 2 J. B. Atlay Victorian Chancellors 460 (1908).

4. *See* Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 Tul. L. Rev. 475, 484-85 (1933).

5. The Preamble to the Code of Professional Responsibility states in part: "[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction."

The Code of Judicial Conduct—which the ABA adopted in 1972 and which the Judicial Conference of the United States promulgated at its April 1973 meeting to govern the conduct of federal judges—is to similar effect. Canon 2 of the judicial conduct code states: "A Judge should avoid impropriety and the appearance of impropriety in all his activities." The Commentary elaborates: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. . . . [A judge] must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." 69 F. R. D. 273, 274 (1976).

6. Local Rule 11 provides that the ABA's ethical guidelines "shall become standards of conduct for attorneys of this Court." *See Kroungold v. Triester, supra,* 521 F. 2d at 765 n. 3.

of impropriety." *Richardson v. Hamilton International Corp.*, 469 F. 2d 1382, 1385-86 & n. 12 (3d Cir. 1972), *cert. denied*, 411 U. S. 986 (1973).

These considerations form the backdrop to our approach in this appeal. Thus, we are not concerned with (a) factual determinations whether Kramer was the de facto attorney in these proceedings or whether it was variously Britton or Kapustin; or (b) the quality of the professional services rendered by counsel on behalf of the plaintiff class; or (c) the motivations of Kramer as a plaintiff, as a class representative, or as an attorney-employer or attorney-partner of the attorney who formally appeared for the plaintiffs. In the view we take, we may assume that Kramer is not and was never the attorney in fact, that the professional representation rendered variously by Britton and Kapustin is of the highest caliber, and that Kramer's interest in these proceedings is limited to his role as a named plaintiff and member of the class. With these assumptions we proceed.

IV.

In the federal courts, the right of parties to "plead and conduct their own cases" [7] has been protected by statute since the beginning of our natior *Faretta v. California*, 422 U. S. 806, 812 (1975). Indeed, in the criminal context, one has a constitutional right to represent himself. *Ibid.* at 836. Thus, we take it as settled that any plaintiff *qua* plaintiff—including Kramer were he not also a class representative—may represent himself pro se.

Appellees do not appear to contest seriously that, in the circumstances of this case, it would have been improper for Kramer, the class representative, to designate himself as counsel for the class. In his deposition, Kramer stated

7. 28 U. S. C. § 1654.

that he would not accept any portion of a court-awarded attorney's fee derived from this case "[b]ecause I thought that as a plaintiff in the purported class action case I could not benefit from the case other than as a member of the class, and could not benefit differently from other members of the class." App. at 77a. We agree.

The very nature of this litigation—a Rule 23(b)(3) class action for money damages—suggests the possibility that success, either by verdict and judgment or by settlement, would result also in a court-awarded attorneys' fee from the fund created for the benefit of the class. Federal courts have long recognized "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 257 (1975); *see, e.g., Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939). *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803 (1972); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).[8] We have subscribed to these general views. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 165 (3d Cir. 1973); *see SEC v. Aberdeen Securities Co.*, 526 F. 2d 603, 607 (3d Cir. 1975).

Thus, Kramer acted wisely in the position articulated in deposition. Clearly he perceived that he could be accused of a conflict of interest were he to anticipate a share

8. Dawson summarized the theory thusly: "[A] benefit to the fund is supposedly required. . . . The standard formula [of benefit] . . . mix[es] together three distinct ideas: that a fund can be benefited by being 'created, increased or protected' . . . ." 87 HARV. L. REV. at 1626.

of the potential court-awarded attorneys' fee in addition to his recovery as a member of the class.

Appellee Kramer also demonstrated an awareness of fealty to the spirit of Canon 9 of the Code of Professional Responsibility: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Given the possible conflict of interest [9] between the class member plaintiff *qua* plaintiff and the class member plaintiff *qua* counsel, under circumstances in which an equitable fund may be created from which an attorneys' fee may be awarded,[10] we agree that a plaintiff class representative could not, with complete fidelity to Canon 9, serve as class counsel.

Appellees argue that *Kohn v. American Metal Climax, Inc.*, 458 F. 2d 255 (3d Cir.), *cert. denied*, 409 U. S. 874 (1972), and *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir.), *cert. denied*, 398 U. S. 950 (1970), can be read as holding to the contrary. We disagree. The challenge raised in this appeal, *see* pages 5-6 *supra*, was not presented to the court in those cases. Thus it cannot be said that we have considered, adjudicated and set forth a holding regarding the duality problem.[10a]

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9. Ethical rules emanating from Canon 5 may also indicate a conflict. See especially DR 5-101 and DR 5-102. DR 5-101(B) provides, in part, that "[a] lawyer shall not [with certain exceptions] accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness . . . ."

10. There might be cases, appropriate to class action treatment, where success would not result in a beneficial fund for the class. *See* F. R. Civ. P. 23(b)(2). In such circumstances, the conflict of interest impediments to an attorney-plaintiff class representative also serving as counsel might not be present. We do not decide the rule that should obtain in such circumstances.

10a. "A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given." H. BLACK, LAW OF JUDICIAL PRECEDENTS 37 (1912).

Having concluded that the attorney-plaintiff class representative may not also serve as counsel for the class in cases such as this, we must now consider the effect of Canon 9 on the situation in which the partner (or employee) of the attorney class representative is chosen as counsel.

V.

Historically, members of this nation's bar both have formed cutting edges and have wielded shields in zealous efforts to vindicate and protect interests of all kinds—individual, public, and social; economic, political, cultural, and personal. As private attorneys general and frequently in class action contexts, they have guided litigation insisting that legislative mandates be obeyed, administrative regulations respected, and constitutional guarantees observed. Often their intense advocacy has generated controversy in both the private and public sectors. Often issues they probe are sensitive, provocative and disputatious. Recently, however, critics have challenged the altruism of some class action lawyers and charged that the paramount motivation for such litigation was counsel's desire to generate substantial fees. The cynic's argument may have a certain validity. But that validity need not serve as the basis for our every rule; nor does it detract from, nor should we lose sight of, the fundamental laudatory purposes of the class action device:

> Its historical purpose was to alleviate the burden on the court and its facilities in cases where a claim was common to a large number of persons. . . . Its use in claims for damages is justified where the public policy considerations of efficient court administration outweigh the potential prejudice to persons in interest who are not parties to the proceedings, but who may

nevertheless become legally bound by an adjudication as if they were in fact parties litigant.

Also influencing the general acceptance of class actions has been recognition of the fact that the collective or accumulative technique of this device makes possible an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons, were it not for the joinder procedure. The 1966 amendments to Rule 23 are a restatement and reinforcement of public policy, mutually expressed by the Judicial Conference of the United States, its advisory committee on Rules of Civil Procedure, the Supreme Court, and the Congress, which candidly facilitate and encourage the use of class actions.

Greenfield v. Villager Industries, Inc., 483 F. 2d 824, 831 (3d Cir. 1973) (footnote omitted).

Thus, a class action is a special type of legal proceeding. Our inquiry becomes necessary only because an attorneys' fee may emanate from an equitable fund, creating a possible conflict between the interests of the plaintiff class members represented by Kramer and the interest of Kramer's partner Kapustin [11] in maximizing his award as attorney for the class.

Appellees suggest that, in this case, there are adequate safeguards against professional impropriety: "(1) Both plaintiffs have stated that they receive no portion of any attorney's fee that is awarded in this case; (2) No close association exists between plaintiff Harrison and the counsel to the class as they have never been professionally associated; (3) Both plaintiffs, although attorneys, have

11. Presumably, Britton, Kramer's former employee, might also petition for an award from the fund. *See* App. at 190a.

stated that their role in this litigation is limited to that of a party plaintiff." Appellees' Brief at 23.[12]

Whatever effectiveness such disclaimers might have in defending against an accusation of professional impropriety lodged against Kramer or Harrison, they do not meet the criticism that retention of Britton and later Kapustin contravened the appearance of propriety. And it is the *appearance*, not the *fact*, of impropriety which Canon 9 is designed to eliminate.

As Ethical Consideration 9-2 of the Code of Professional Responsibility cautions in part, "[o]n occasion, ethical conduct of a lawyer may appear to laymen to be unethical." Laymen generally understand basic partnership attributes. The word "partner" has a meaning among the laity [13] that does not vary substantially from its jurisprudential ramifications.[14] Implicit in the term is a sharing

12. A fair reading of Harrison's deposition testimony reveals that his interest in these proceedings is that of a class member, *i.e.*, to recover as a joint owner any damages relating to the stock in Scientific Control he held with Kramer. Kramer asked him to be a plaintiff and designated counsel for them. Harrison said that at no time had he discussed with Kramer or Kapustin any compensation for Kapustin. "I left it completely in Mr. Kramer's hands, basically for personal reasons," he said. App. at 101a. By comparison, Kramer testified that his interest in the litigation was so keen that he, as class representative, would advance the costs, even if they amounted to $100,000 or $150,000. *Ibid.* at 79a.

13. "Partner" is defined by Webster's as "a person who takes part in some activity in common with another or others; associate; [*e.g.*,] *a*) one of two or more persons engaged in the same business enterprise and sharing its profits and risks . . . ." WEBSTER'S NEW WORLD DICTIONARY 1036 (2d college ed. 1970).

14. Black's defines "partner" as "[a] member of copartnership or firm; one who has united with others to form a partnership in business." Partnership is defined as:

> A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them.

of profits and losses. Esoteric internal protections in writing or under oath, insulating the plaintiff-attorney partner from participating in a fee, can hardly dissipate the lay notion that action by one partner is action for the partnership. Accordingly, we cannot agree that an appearance of an improper conflict of interest inherent in one partner's dual role as class representative and as class counsel vanishes when his partner is substituted as class counsel. To argue as appellees do is to argue against reality, against the vagaries of human nature, and against widely-held public impressions of the legal profession. Thus, if one concludes, as we do, that an appearance of impropriety, at a minimum, ensues when an attorney class representative also serves as counsel for a class that may benefit from an equitable fund, substituting a partner as counsel will not suffice as an antidote. If we are to provide force and vigor to Canon 9, a prophylactic rule prohibiting appointment of a partner as counsel is mandated in such circumstances. What we have said concerning substitution of a partner of the attorney-class representative applies equally to substitution of an attorney-employee or office associate as counsel.

Finally, appellees argue that disqualification of Kapustin at this late date would deprive the class of the familiarity with the case he developed during its pendency. Subsumed in this argument is the contention that appel-

14. (Cont'd.)

> A partnership is an association of two or more persons to carry on as co-owners a business for profit.
>
> Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry, furnished in determined proportions by the parties.
>
> Partnership is where two or more persons agree to carry on any business or adventure together, upon the terms of mutual participation in its profits and losses.

BLACK'S LAW DICTIONARY 1330-31 (3d ed. 1933) (citations omitted).

lant dallied unnecessarily in presenting its disqualification motion to the district court. On this record, we are unpersuaded by either claim.[15] The motion to disqualify was filed within two months of the denial of reconsideration of the class action certification decision. Defendants certainly could not be faulted for litigating the class certification first. Had they won on that score, the action might have gone forward as an individual action, in which case the disqualification issue might never have surfaced. *See* pages 7-8 *supra*. Concomitantly, we cannot accept the proposition that disqualifying Kapustin now will work an undue hardship on the class. The district court, which has supervised the progress of this case—slow though it may have been—, has stated that "[t]he issue of liability is not complex and should not consume too much trial time." 67 F. R. D. 98, 102 (denying motion to reconsider class certification). That being so, it follows logically that it should not require new counsel an inordinate amount of time to become sufficiently familiar with the case to proceed to trial.

15. Ethical Consideration 9-2 instructs: "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." (footnote omitted). The conclusion we reach today will govern similar actions in the future; it will not affect litigations already concluded. We recognize that there may now be pending class actions in which counsel arguably ought to be disqualified under the rule we announce today. Further, we recognize that in such pending actions an argument might be made, in extraordinary circumstances, that "explicit ethical guidance [did] not exist" heretofore and that invocation of the rule announced herein would not "promot[e] public confidence in the integrity and efficiency of the legal system and the legal profession." We should not and do not decide how such a hypothetical case would be decided. Resolution of the issue must await an actual case or controversy, which should be decided in the first instance by the district court with the benefit of full briefing from counsel.

VI.

As we have observed previously in a constitutional context, "although the right to counsel is absolute, there is no absolute right to a particular counsel." *United States ex rel. Carey v. Rundle*, 409 F. 2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U. S. 946 (1970). We have concluded that vindication of the Code of Professional Responsibility requires the following rule: no member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee award would be appropriate.

The appeal at No. 75-1673 will be dismissed for want of jurisdiction. In the appeal at No. 75-1849, the order of the district court denying the motion for disqualification of appellees' counsel will be reversed and the proceedings remanded.

ROSENN, *Circuit Judge*, Concurring

I join fully in the court's opinion and disposition of the case. I write to make several additional points.

First, and most importantly, I understand the court to hold only that an attorney cannot act as counsel to a class when (a) the action might result in the creation of a fund from which an attorney's fee may be awarded, and (b) the named class representative is also the class counsel or an attorney professionally associated with the attorney seeking to act as class counsel. I thus do not understand the court's rule to bar an attorney from bringing a class

action as plaintiff and acting as the named class representative so long as class counsel is an attorney not professionally associated with the plaintiff attorney. Furthermore, I do not understand the opinion to bar an attorney from acting as counsel to a class of which he might be a member, or to a class with claims similar or identical to claims in which the attorney has a beneficial interest.

Some examples may serve to clarify my point. If a client seeks the advice of an attorney with respect to possible fraudulent dealings in the shares of a corporation in which the attorney is also a shareholder and if an action to recover losses due to those fraudulent dealings would assert a claim the attorney could also assert as a shareholder, I see no reason to require the attorney to decline representing the class of persons with like claims, or to decline membership in the class for him or herself. Similarly, if the attorney's spouse or the law firm in which the attorney is a partner owned the stock, I think the attorney need not decline the representation of the class. Also, if an attorney's corporate client, in which the attorney owns stock, brought an antitrust class action on behalf of it and other corporations, I do not think the attorney need decline representing the class.

I think these situations are distinguishable from the facts of the instant case primarily because there is no appearance of financial conflict of interest and no appearance of improper solicitation—i.e., that the attorney-plaintiff and class counsel collusively use the class action mechanism to acquire clients.[1] Furthermore, to the extent the named class representative has substantive duties to perform—

1. I do not mean to suggest, nor do I understand the panel's opinion to suggest, that we are concerned only with the appearances, rather than the reality, of improper solicitation. I assume that if and when the latter does occur, it can be adequately dealt with through normal bar disciplinary procedures.

such as monitoring the performance of class counsel or agreeing to a settlement—the fact that the representative and counsel are somewhat independent insures that the representative will exercise unconstrained judgment.

Secondly, it is inevitable that this decision will pose some problem for district courts that have already certified classes in which the named representative and class counsel are professionally affiliated. It is my view that in such already ongoing cases automatic disqualification of counsel on defendant's motion is not mandated by this decision. Where it is possible for the class to obtain substitute counsel without substantially prejudicing the interests of the class or substantially delaying the action, the district court should disqualify counsel. There may be cases that have progressed so far and are so complex that requiring substitution of counsel would substantially delay the termination of the litigation and substantially harm the interests of the class members. In such instances, the district court may allow the litigation to proceed to termination without change in representative or counsel. The choice, in my view, lies in the informed discretion of the district court.

Finally, although I join the court's judgment on the jurisdictional issues, I continue to adhere to the views I expressed in my dissent in *Hackett v. General Host Corporation*, 455 F. 2d 618, 626 (3d Cir. 1972), *cert. denied*, 407 U. S. 925 (1972). There I argued that denial of class certification is an appealable order because, first, it qualifies as a collateral order under the doctrine of *Cohen v. Beneficial Finance Co.*, 337 U. S. 541 (1949), and second, it effectively terminates much class action litigation and thus is, in every meaningful sense, a final order. On the other hand, a class certification order does not terminate litigation, nor, in my view, does it ordinarily create the

kind of prejudice necessary to invoke the collateral order doctrine.[2]

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2. The prejudice necessary to establish jurisdiction under the collateral order doctrine is that rights may be irreparably lost without review. *Hackett, supra*, 455 F. 2d at 627 (Rosenn, J., dissenting); Samuel v. University of Pittsburgh, 506 F. 2d 355, 359 (3d Cir. 1974). *See, e.g.*, Eisen v. Carlisle and Jacquelin, 417 U. S. 156, 169-72 (1974), where the lack of appellate review of the district court's order requiring defendants to pay 90% of the costs of notice to class members would have irreparably foreclosed defendants from contesting that order. The prejudice resulting from merely having to continue to defend the suit is, in my view, usually insufficient to invoke appellate jurisdiction. *But see* Herbst v. International Telephone and Telegraph Corp., 495 F. 2d 1308 (2d Cir. 1974).

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 71-1954.

MITCHELL A. KRAMER
and
DAVID C. HARRISON
v.
SCIENTIFIC CONTROL CORP., et al.

Memorandum Opinion.

BECHTLE, *J.* October 1, 1974.

Plaintiffs, two Philadelphia lawyers, brought this action on August 9, 1971, alleging that they purchased 50 shares of Scientific Control Corp. on January 6, 1969, and that less than 30 days later sold them at a loss of over $400. They also aver in the twice-amended complaint that the stock was initially offered for sale pursuant to a prospectus dated October 31, 1968, and that during the period October 31, 1969, through November 21, 1969, Scientific Control Corp. issued various financial reports. They claim that those reports, as well as the prospectus, contain material false statements and omissions. No one has sought to intervene in the action as a party plaintiff. As far as we know, no similar action has been brought against any one or more of the defendants.

Plaintiffs have filed a motion pursuant to Fed. R. Civ. P. 23(c)(1) for a determination that this case may proceed as a class action. In their motion, now before us, they ask that they be determined to be class action representatives of all persons except defendants who purchased stock of Scientific Control Corp. "pursuant to or in reliance on" the prospectus and all other written and oral communications regarding the corporation's financial condition from the date of the initial offering to November 21, 1969. Defendants do not dispute that there were other purchasers of the stock during that period and that they are too numerous to be joined conveniently in this action.

Defendants opposing the motion impugn the motives of plaintiffs in buying and selling the stock and then bringing this action. They claim that plaintiffs brought the action not to recover the $400 loss but to profit from court-awarded counsel fees in a class action. Therefore, they maintain that the prerequisites of Rule 23(a)(4) are not met.[1]

Assuming the impropriety of plaintiffs' motives in instituting the action, we do not believe the unnamed members of the proposed class should be penalized for that reason. From our observation of the manner in which plaintiffs have proceeded with this action up to this juncture, we conclude that they will fairly and adequately protect the interests of the class.[2] This action may proceed as a Rule 23(b)(3) class action.

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1. Subdivision (4) of Rule 23(a) provides: "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

2. Plaintiffs need not have a large damage claim in order to represent the class. The size of their claim is not dispositive of whether they will adequately represent the class. *Eisen v. Carlisle & Jacquelin*, (Eisen II) 391 F. 2d 555, 563 (2nd Cir. 1968); 7 *Wright & Miller*, Fed. Pract. & Proc. § 1767.

The decision to allow this case to so proceed does not mean that the opportunity to raise the question of improper motive has been foreclosed in this case. Defendants' objection to the class action based on that issue is more properly addressed to the amount, if any, of plaintiffs' right to recover damages (*Rochez Bros., Inc. v. Rhoades*, 491 F. 2d 402, 410 (3rd Cir. 1973)) and to be awarded attorneys' fees.

Plaintiffs' motion will be allowed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 71-1954.

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MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP., et al

———

Memorandum Opinion.

BECHTLE, *J.* October , 1974

AND NOW, TO WIT, this 1st day of October, 1974, IT IS ORDERED that plaintiffs' motion for a determination that this action may proceed as a Rule 23(b)(3) class action and that plaintiffs be determined to be representatives of the class is *granted.*

LOUIS C. BECHTLE, J.

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1954.

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP.; and ARTHUR ANDERSON & CO.; and H. L. FEDERMAN & CO.; and KLEINER, BELL AND CO., INC.; and JOHN B. BAIRD; and DONALD G. O'NEAL; and L. T. RATNER; and NORMAN C. YOUNG; and CLYDE WILLIAMS; and VAN CALVIN ELLIS; and H. L. FEDERMAN; and PATRICK S. MARTIN; and WILLIAM C. WEATHERFORD; and ERNEST E. SPECKS; and HENRY W. HOOKER; and MERRILL J. WHISTON; and ARTHUR E. SPECKHARD; and WILLIAM S. LEE and JOSEPH T. JONES.

Memorandum and Order.

BECHTLE, *J.* April 17, 1975

This Court permitted this case to proceed as a class action on October 1, 1974, after delaying that decision until after it had ruled on defendants' various motions to dismiss.[1] Defendants now ask this Court to revoke that

1. See, 365 F. Supp. 780 (1973).

Order. For reasons hereinafter stated, we will deny their motion for reconsideration.

While a class action determination is never irrevocable, *Seligson v. Plum Tree, Inc.*, 61 F. R. D. 343 (E. D. Pa. 1973), the proponents of revocation or modification of a class action Order should, at minimum, show some newly discovered facts or law in support of their desired action. Defendants have not met that minimum. The grounds they list now include those which they gave previously or could have asserted earlier but did not. It seems that the two named plaintiffs are incapable of acting as class representatives.

Plaintiffs are members of the law firm which employs the lawyer who represents them. Defendants' main ground is that a conflict of interest between plaintiffs and the class they represent is inherent in their being represented by their own law firm.[2] In the case of *Umbriae, et al v. American Snacks, Inc.*, (E. D. Pa. C. A. No. 74-549, decided January 27, 1975), plaintiffs sought to represent a class of debenture holders who purchased the securities after relying upon a misleading prospectus. One of the named plaintiffs was a partner of the law firm representing the plaintiffs. The case was transferred from this District to the United States District Court for the District of Massachusetts under 28 U. S. C. § 1404(a). Nevertheless, Judge Higginbotham, as the transferor Judge, fortunately expressed his opinion on how he would have resolved the attorney-representation conflict issue, if the matter were not transferred, as follows (Slip Opinion, pp. 16-17):

> "Touche Ross contends that a conflict of interest exists between the representative parties and the class be-

2. This was the principal ground pressed by defendants in originally opposing the class action motion.

cause the named plaintiffs, Cletus Lyman, Esquire, is an attorney and partner with counsel for plaintiffs, Richard A. Ash, Esquire, in the law firm of Lyman & Ash. The remaining named plaintiffs, defendants claim, are 'siblings' of Cletus Lyman. It is in the nature of the motion practice on class determination issues that defendants, who naturally have no interest in the successful prosecution of the class suit against them, are called upon to interpose arguments in opposition to class determination motions verbally grounded upon a concern for the 'best' representation for the class while the implicit, but nonetheless real, objective of their vigorous legal assaults is to insure 'no' representation for the class. Of course I must assess defendants' argument upon its intrinsic merit, but on this issue it is my judgment that Lyman's status as an attorney, his business relationship with counsel for plaintiffs, and his family relationship with the other named plaintiffs do not create interests which are adverse to those of the class, and thus neither the named plaintiffs nor counsel for plaintiffs should be disqualified from class representation. Although Cletus Lyman may benefit through his partnership in the law firm of Lyman & Ash from an award of legal fees, if plaintiffs are successful in the present litigation, this interest does not in my opinion create substantially more of a risk that the suit would be compromised unfairly as respects class interests than would exist if there were no relationship between the representative parties and counsel for plaintiffs. The vision of substantial counsel fees might cloud the judgment of counsel for plaintiffs and the representative parties but the court does not in granting a motion for class determination entrust to the representative

parties ultimate responsibility for determining the fairness to the class of settlement decisions which compromise class interests. Any compromise or dismissal of a class action must be approved by the court and notice of the proposed compromise or dismissal must be given to all class members; judicial approval should be granted only after the court determines that the compromise is in the interest of the entire class. Fed. R. Civ. P. 23(e).[10] *Euresti v. Stenner,* 458 F. 2d 1115 (10th Cir. 1972). In my estimation the safeguard provided in Rule 23(e) against litigation compromises unfair to the class as a whole are adequate to insure protection of class interest under the representation of these named plaintiffs and counsel. *Kramer v. Scientific Control Corp.,* 365 F. Supp. 780 (E. D. Pa. 1973) (See also Slip Opinion of October 1, 1974).

Blumberg, et al. v. Barrett (E. D. Pa., C. A. No. 73-237, decided December 27, 1974), is not to the contrary. In that case, this Court found there was a conflict created by having Malcolm Blumberg, Esquire, as one of the named plaintiffs. This was not just because he was a member of the law firm representing plaintiffs, but for the reason that the law firm was a close friend and business associate of another named plaintiff, William Richman, whose interest clashed with those of the absent class members. In fact, the plaintiffs should have sued Richman but omitted to do so.

"10. Fed. R. Civ. P. 23(e) reads:

'Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.'"

Moreover, Rule 23(d) [3] allows some latitude for the District Court to take appropriate action to guard against any conflicts of interest which would crop up in the course of the action. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727, 737 (3rd Cir. 1970).

Plaintiffs purchased their shares of Scientific stock from the brokerage firm of Merrill, Lynch, Pierce, Fenner and Smith, Incorporated ("Merrill Lynch"). A number of former shareholders of Scientific commenced actions in the United States District Courts against Merrill Lynch for the role it played in selling stock to the public. One of the actions was brought in the Northern District of Texas, another in the Southern District of New York. Defendants contend that the failure of plaintiffs to name Merrill Lynch, a former client of theirs, as a defendant in this action disqualifies them from representing the class. That plaintiffs chose not to sue Merrill Lynch for reasons other than the fact that they had previously represented that firm is supported by the record.

The most important one is that there is no proof that the brokerage firm recommended that plaintiffs make the purchases. Second, the actions against Merrill Lynch are based on that firm's alleged misrepresentations and omissions of material facts in its written and oral statements. In an action brought against the brokerage firm in the Northern District of Texas, the Fifth District has ruled that the case was not appropriate for class action treatment because of the nonstandardized form of the alleged misrepresentations. *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F. 2d 880 (1973). The District Court for

3. Rule 23(d)(2) provides in part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members to signify whether they consider the representation fair and adequate . . ."

the Southern District of New York held the class action motion in the case before it in abeyance to permit the plaintiffs in the case to submit additional evidence regarding the sale of stock by the brokerage firm. *Mascolo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 61 F. R. D. 481 (1973). So, even if Merrill Lynch had suggested to plaintiffs that Scientific stock would be a good investment, a class action against that firm would be ill-advised. Finally, there has been no showing that Mitchell Kramer's prior representation of Merrill Lynch will prevent plaintiffs from adequately representing the class here.

Another ground offered by defendants supporting their contention that plaintiffs should be disqualified from representing the class is that the latter have demonstrated their inability adequately to protect the interest of the class by their failure to take steps to ascertain the identity of, or give notice of this action to, members of the class. There has been undue delay. Scientific, one of the defendants, is not without contributing fault. In cases of this type, the identity of each member of the class is usually learned from one of the defendants' records or its stock transfer agent. If defendants were really concerned about the interest of the class, they could have offered information to plaintiffs which would have facilitated an earlier ascertainment of the class composition. The excuse given by Scientific for not cooperating is that it is no longer doing business. However, its transfer agent, Republic National Bank of Dallas, Texas, is still functioning. Though Scientific informed plaintiffs that it did not have the stock transfer list, neither that corporation nor the bank told them that the transfer records are stored in Dallas, Texas, under a court order in the case of *Reilly v. Merrill Lynch* (C. A. 3-6130E), a case originating in the Northern District of Texas and later transferred to the Southern District of New York, where it was consolidated with *Mascolo v.*

Merrill Lynch. Plaintiffs' counsel did not learn of the impoundment until recently. Plaintiffs have advised the Court that they will microfilm those lists now that they have been permitted to do so by the District Court for the Southern District of New York.[4] They have also advised the Court that if the transfer records do not contain sufficient information for them to provide individual notice, they are prepared to notify the class by publication, which would be "the best notice practicable under the circumstances" as required by Fed. R. Civ. P. 23(c)(2).

Under the heading that plaintiffs' claims are not typical of those of the class they represent because allegedly they have suffered no damages under § 11(e) of the Securities Act of 1933, 15 U. S. C. § 77k(e), defendants are attempting to have this Court reconsider its ruling on their motion to dismiss the second amended complaint. Plaintiffs bought their 50 shares, not when the stock was originally offered to the public but in the market or over-the-counter transaction from Merrill Lynch. They sold the shares in the market one month later at a loss. Both the purchase and sale occurred before the filing of the original complaint in this action. Subsection (3) of § 11 places a limit on the amount recoverable in this type of action. Defendants would have us read the words "(not exceeding the price at which the security was offered to the public)" appearing twice in subsection (3) as though it meant only the price at which the security was listed by the issuer in the original offering to the public rather than the price when plaintiffs later bought the stock in the open market. Defendants have cited no authority supporting their interpretation. We adhere to our former ruling.

4. By Order dated March 26, 1975, Judge Charles L. Brieant, Southern District of New York, has permitted the microfilming to take place and plaintiffs have advised that the stock transfer records of Scientific Control Corporation will be examined and copied this month in Dallas, Texas.

Because plaintiffs have alleged in their Second amended complaint that they relied on oral as well as written misrepresentations, defendants argue that common questions of fact and law do not exist for class action treatment. Plaintiffs do not deny that the oral statements may have varied as to each individual class member or group. However, the violation of the disclosure rule in the prospectus and other documents will be the same for the class. This common nucleus of statements satisfies the predominance of common questions requirement of Rule 23(b)(3). See, *Bisgeier v. Fotomat Corporation,* 62 F. R. D. 113 (N. D. Ill., 1972); *In re Memorex Security Cases,* 61 F. R. D. 88 (N. D. Cal. 1973); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc.,* 52 F. R. D. 335, 344-346 (D. Minn. 1971).

Finally, and in the alternative, defendants request that our Order of October 1, 1974, permitting this case to proceed as a class action be certified pursuant to 28 U. S. C. § 1292(b) so that an immediate appeal from that Order may be taken. As pointed out by Judge McGlynn in *Blumberg, et al. v. Barrett, et al, supra,* because of the binding effect of a judgment in a class action upon "those who are defined to be in the class and who after notice have not affirmatively sought to exclude themselves," the question of adequacy of representation of the class is not to be lightly regarded. This case has been on our dockets since August 9, 1971. Trial on the merits cannot take place until the class has been given an opportunity to respond after being notified under Rule 23(c)(2). The issue of liability is not complex and should not consume too much trial time. Plaintiffs who stand to lose the most if the class action determination is overturned on appeal are willing to proceed to trial. In my opinion, trial on the merits should not be further delayed. The motion will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Civil Action No. 71-1954.

—

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP., et al

Order.

AND NOW, TO WIT, this 17th day of April, 1975, IT IS ORDERED that the motion of defendants for reconsideration of plaintiffs' motion for class action determination is *denied.*

IT IS FURTHER ORDERED that defendants' alternative motion for certification pursuant to 28 U. S. C. § 1292(b) is also *denied.*

LOUIS C. BECHTLE, J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1791

ARTHUR ANDERSEN & Co.,

Petitioner,

—v.—

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MEILEN PRESS INC. — N. Y. C. 219

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IN THE

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—v.—

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This brief is submitted in opposition to the petition for writ of certiorari of Arthur Andersen & Co., one of the defendants herein, which seeks review of a judgment and decision of the United States Court of Appeals for the Third Circuit, entered in these proceedings on April 20, 1976.

That decision dismissed the appeal of petitioner, taken pursuant to 28 U.S.C. § 1291,[1] from an interlocutory class action certification order entered by the United States District Court for the Eastern District of Pennsylvania. Dismissal of the appeal was required by the final judgment rule applied in accordance with well settled principles established by this Court and consistently followed by all

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[1] 28 U.S.C. § 1291 is set forth at Appendix A-1.

the Circuit Courts. This Court has declined to review such principles on many recent occasions. *Touche Ross & Co.* v. *Seiffer,* 96 S.Ct. 779 (1976); *Cessna Aircraft Co.* v. *White,* 96 S.Ct. 363 (1975); *Touche Ross & Co.* v. *Fabrikant,* 96 S.Ct. 424 (1975); *Hackett* v. *General Host Corp.,* 407 U.S. 925 (1972).

The interlocutory class action certification order appealed from in this suit does not differ from the orders appealed from in the aforesaid actions. Aware of this, petitioner seeks to have the interlocutory determination of class certification reviewed by this Court by recklessly charging respondents with "unethical behavior", "strike suits", "deceit", "professional impropriety", et al. These charges have been repeatedly made in this action by petitioner to the District Court and to the Court of Appeals for the Third Circuit. In marked contrast to petitioner's vitriolic attacks on respondents, the District Court has determined that the complaint sets forth valid claims for relief against defendants, including petitioner, for violation of the federal securities laws, that the case was properly brought as a class action, and that respondents will fairly and adequately protect the interests of the class, and the Court of Appeals has remarked that respondents have demonstrated an awareness of fealty to the Code of Professional Responsibility. Petitioner is now attempting to have this Court make a factual determination to the contrary (i.e., that respondents are unethical), in order to reverse the trial judge's exercise of discretion under Fed. R. Civ. P. 23 in certifying this action as a class action.

Questions Presented

Does an appeal lie under 28 U.S.C. §1291 challenging the propriety of a trial judge's exercise of discretion in issuing

an interlocutory order which determined that the requirements of F.R.C.P. Rule 23[2] had been met?

Should this Court review the factual determinations of the District Court and the Court of Appeals for the Third Circuit which did not sustain petitioner's charges of strike suit, deceit, unethical conduct and the like?

Statement of the Case

Respondents, on January 6, 1969, purchased, as joint tenants, common stock of Scientific Control Corp. ("Scientific"), in reliance on a prospectus, as well as upon financial reports and other data of Scientific regarding the coporation's financial condition, which, they allege, deceived them and other purchasers as to the true worth of the stock. Less than thirteen months after the effective date of registration and original offering of the stock, Scientific filed a petition for an arrangement under Chapter XI of the Bankruptcy Act.

Respondents filed their complaint on August 9, 1971, for damages pursuant to Sections 11, 12(2), 15 and 17(a) of the Securities Act of 1933 (15 U.S.C. § 77 k, 77 l(2), 77 o and 77 q(a), and Sections 9(a)(4), 10(b) and 18 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 i(a)(4), 78 j(b) and 78 r, the rules and regulations thereunder and common law fraud principles.

The prospectus and the other financial reports on Scientific failed to reveal, among other items, a liability of $500,000 incurred by Scientific before the date of the prospectus and the fact that all accounts receivable had been pledged as collateral for obligations incurred by

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[2] The relevant provisions of F.R.C.P. Rule 23 are set forth in Appendix A-1, 2, 3.

Scientific. The District Court has noted that the inclusion of the amount of the $500,000 loan in the Registration Statement would have increased Scientific's current liabilities by almost 50%. [365 F.Supp. at 789, note 10.]

The defendants are Scientific; H.L. Federman & Co., and Kleiner, Bell & Co., Inc., the principal underwriters of the issuance of 400,000 shares of Scientific common stock; petitioner, the accountant for Scientific; and the individual defendants, who were officers and/or directors of Scientific.

Prior Proceedings In This Action

Fourteen of the defendants (including petitioner) filed motions to dismiss the complaint on various grounds or to quash service of process. In its decision of September 27, 1973, as amended November 27, 1973, the District Court determined that respondents had stated valid claims for relief against petitioner and other defendants under the Securities Act of 1933 and the Securities Exchange Act of 1934.[3]

On October 1, 1974, the District Court determined that the case may proceed as a class action on behalf of all persons, except defendants, who purchased stock of Scientific pursuant to or in reliance on the prospectus and the other reports regarding the corporation's financial condition from October 31, 1968 to November 21, 1969.[4] Defendants did not dispute that the purchasers of the stock

[3] This decision is reported at 365 F.Supp. 780. The District Court dismissed the claims brought under §9(a)(4), 15 U.S.C. §78i(a)(4), and granted the motions of defendants Kleiner, Bell & Co., Inc. and H.L. Federman & Co. to dismiss the claims brought against them under Sections 12(2), 15 and 17(a)(2) of the Securities Act of 1933.

[4] This decision is reported at 64 F.R.D. 558 (1974).

during that period were too numerous to be joined conveniently in the action. They, rather, opposed respondents' motion for a class determination by impugning the motives of respondents (the class representatives).

The Court stated that defendants' attack on the size of respondents' individual claims is not dispositive of whether they will adequately represent the class and noted that: "From our observation of the manner in which plaintiffs have proceeded with this action up to this juncture, we conclude that they will fairly and adequately protect the interests of the class." 64 F.R.D. at 559. And, in a statement that we submit is dispositive of this petition for writ of certiorari challenging the class action determination, the District Court stated that its decision to allow the case to proceed as a class action did not mean that defendants' opportunity to seek to deny class action determination had been *finally* determined. 64 F.R.D. at 559.

On April 17, 1975, the District Court denied petitioners' motion for reconsideration of its class action certification or, in the alternative, for a certification pursuant to 28 U.S.C. § 1292 (b).[5] Petitioner appealed this decision under 28 U.S.C. § 1291.

On June 20, 1975, petitioner moved the District Court, *inter alia*, to disqualify respondents' counsel, alleging that there was an irreconcilable conflict of interest between respondents' representation by the law firm of Kramer & Salus and the representation of the members of the class by the respondents. The District Court denied the motion and petitioner appealed.

The Court of Appeals decided both appeals together. It dismissed petitioners' appeal from the class certification

[5] This decision is reported at 67 F.R.D. 98 (1975).

decision, holding that such a determination was not an appealable final order under 28 U.S.C. § 1291. It determined, on the other hand, that the order denying the motion to disqualify respondents' counsel was appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In its decision,[6] the Court of Appeals assumed that the professional representation rendered by respondents' attorneys was of the highest calibre, and that respondent Kramer had rightly limited his interest in these proceedings to that of a member of the class.[7] The Court of Appeals stated that respondent Kramer "acted wisely" in the position he articulated in his deposition that he would not accept any portion of a court-awarded attorneys' fee derived from this case because he perceived that he could be accused of conflict of interest were he to benefit from the case other than as a member of the class.[8] The Court of Appeals also noted that respondent Kramer "demonstrated an awareness of fealty to the spirit of Canon 9 of the Code of Professional Responsibility.[9] It went on to say that although respondents have stated: that they will receive no portion of any attorneys' fee that is awarded in this case; that no close association exists between respondent Harrison and the counsel to the class, as they have never been professionally associated; and both respondents, although attorneys, have stated that their role in this litigation is limited to that of a party-plaintiff—these facts while they may effectively guard against an accusation of professional impropriety, do not meet the criticism that the retention of attorneys

[6] This decision is set forth in Appendix A to the Petition For Writ of Certiorari.

[7] Id. at p. A-8.

[8] Id. at p. A-9.

[9] Id. at p. A-10.

associated with respondent Kramer contravened the appearance of propriety. "And it is the *appearance,* not the *fact* of impropriety which Canon 9 is designed to eliminate." [10]

The Court, commenting that Ethical Consideration 9-2 of the Code of Professional Responsibility cautions that . . . "on occasion, ethical conduct of a lawyer may appear to laymen to be unethical",[11] concluded that the vindication of the Code of Professional Responsibility with respect to the appearance of impropriety required it to grant the request for disqualification of Steven Kapustin as counsel for the class. It ruled that disqualification of Kapustin would not work an undue hardship on the class, since the issue of liability is not complex and should not consume too much trial time, thus new counsel should not require an inordinate amount of time to become sufficiently familiar with the case to proceed to trial.

By reason of the decision of the Court of Appeals, respondents have retained new counsel for the class in place of Steven Kapustin to prosecute this action.[12]

Petitioner filed a petition for writ of certiorari with respect to that portion of the Court of Appeals decision which held that the interlocutory class certification herein was not a final order under 28 U.S.C. § 1291.

[10] Id. at p. A-13.

[11] Id. at p. A-13.

[12] Respondents have retained the law firm of Wolf Popper Ross Wolf & Jones, whose expertise and competence in this field has been judicially noted on several occasions. See, for example, the comments of Judge Walter Mansfield in *Berland* v. *Mack*, 48 F.R.D. 121, 127, 128 (S.D.N.Y. 1969), (a suit wherein the Wolf Popper firm had been appointed lead counsel by Judge Mansfield).

Reasons for Denying the Writ

The sole issue before this Court is whether an appeal lies under 28 U.S.C. § 1291 challenging the propriety of a trial judge's exercise of discretion in issuing an interlocutory order which found that the requirements of F.R. Civ. P. 23 had been met. The petition for writ of certiorari should be denied because the interlocutory class order from which petitioner appealed under § 1291 was not a final order, and would not have been appealable as an exception to the final judgment rule in any Circuit. There is no difference of opinion among the Circuits on that question.

Petitioner, attempting to obfuscate the sole issue before the Court, has chosen to charge respondents with unethical conduct, deceit, professional impropriety, commencing a strike suit, etc. As a review of the previous decisions in this action evidences, those charges have not been sustained by the Court of Appeals or by the District Court. Petitioner's attempt to have this Court make a factual determination to the contrary in an attempt to deny the purchasers of Scientific common stock class representation represents a misuse of the petition for writ of certiorari procedure.

POINT I

The Instant Class Certification Order Is Not Appealable Under § 1291 As a Final Order.

It is axiomatic that the Courts of Appeals have jurisdiction over appeals of right under 28 U.S.C. § 1291 only from "final decisions" of the district courts. The statutory limitation is the product of a policy judgment about judicial administration which was written into the first Judiciary

Act and adhered to ever since. See, *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940). The requirement eliminates the waste of judicial time and the obstruction to just claims that would come from permitting a succession of separate appeals from the various rulings to which a litigation may give rise from its initiation to entry of judgment. *Cobbledick, supra,* at 325.

The final judgment rule is of such crucial importance to the efficient and just administration of the federal judicial system that this Court has recognized that a litigant should be permitted to depart from that rule only in an extremely narrow category of cases where the non-final order appealed (1) is separable from and collateral to the claims asserted in the action, (2) would finally determine the collateral question, and (3) would result in irreparable harm by any delay in appeal. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Courts of Appeals have been uniform in holding that interlocutory class action certification orders of the type at issue herein, do not fall within the *Cohen* doctrine. *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975); *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975); *Hellerstein* v. *Mr. Steak, Inc.*, 531 F.2d 470 (10th Cir. 1976); *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973); *Hackett* v *General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972); *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir. 1975); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969).

These decisions recognize that under Rule 23, the district court is given broad discretion to determine the maintainability and the conduct of class actions. By the very language of the rule, any order rendered by the district court regarding the maintenance of the class action "may

be considered conditional, and may be altered or amended before any decision on the merits." Fed. R. Civ. P. 23 (c)(1). The District Court in this case specifically recognized the non-finality of its class action determination.

Given these facts, it is apparent that the order here cannot be considered "final" in the manner indicated by the *Cohen* and *Eisen IV*[13] decisions. *In re Cessna Air. Distrib. Antitrust Litigation,* 518 F.2d 213 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 363; *Hellerstein* v. *Mr. Steak, Inc.,* 531 F.2d 470 (10th Cir. 1976).

Petitioner's theory that *Eisen IV* mandates the Courts of Appeals to review all interlocutory class certification orders if they are immediately appealed has been rejected time and again. See, *In re Cessna Air Distrib. Antitrust Litigation, supra; Hellerstein* v. *Mr. Steak, Inc., supra; Blackie* v. *Barrack, supra.* The district court's order in *Eisen IV* had directed that 90% of the cost of notice should be paid by the defendants and had dispensed with individual notice to members of the class whose identity was readily attainable. If defendants had paid for 90% of the costs of notice and the order directing payment was eventually found improper, it was evident that plaintiffs did not have the resources to repay defendants. This Court, rather than declaring a general rule that all class action determinations were subject to immediate review by the Courts of Appeals, specifically stated that it was the District Court's Order in that case imposing 90% of the notice costs on respondents that fell within "that small class" of decisions reviewable under the *Cohen* directive. 417 U.S. at 172. The Court said that the order on notice:

> ". . . *conclusively* rejected respondents' contention that they could not lawfully be required to bear the

[13] *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974).

> expense of notice to the members of petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in *Cohen,* the District Court's judgment *on the allocation of notice costs* was a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it, id., at 546-547, 69 S.Ct. at 1226, and it was similarly appealable as a final decision under § 1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution *of the class action notice problems* in this case . . ." (emphasis added) 417 U.S. at 172.

None of the extraordinary and final determinations in the *Eisen* case is present in the instant class action certification appealed from. Rather, the instant interlocutory class certification order is similar to all the other orders which have been held to be "non-final" and which determinations this Court has previously declined to review on many occasions subsequent to the *Eisen IV* decision. See, *Touche Ross & Co.* v. *Fabrikant,* 96 S.Ct. 424 (1975); *Touche Ross & Co.* v. *Seiffer,* 96 S.Ct. 779 (1976); *Cessna Aircraft* v. *White,* 96 S.Ct. 363 (1975).

Petitioner argues that respondents are not proper class representatives and that the District Court was wrong in not disqualifying them. This is clearly an issue that does not fall within the *Cohen* doctrine. *In re Cessna Air. Distrib. Antitrust Litigation, supra; Rodgers* v. *United States Steel Corp.,* 508 F.2d 152 (3rd Cir. 1975), *cert. denied,* 96 S.Ct. 54. It is neither a final disposition of the entire case, nor a final disposition of that issue.

Petitioner argues that the Third Circuit erred in not applying to this interlocutory class action determination

a review similar to that enunciated by the Court of Appeals for the Second Circuit.[14] However, in *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650, 658 (2d Cir. 1975), the Second Circuit clearly holds that no appeal lies from a

> "discretionary ruling of the district judge that the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3) have been satisfied."

The District Court's decision in the case at bar was precisely such a "discretionary ruling." Accordingly, the dismissal of the appeal from that decision is in full agreement with the rule of the Second Circuit and of every other circuit court of appeals.[15]

In sum, the petition presents no question warranting review by this Court. The Court of Appeals was eminently correct in ruling that petitioner cannot appeal as a matter of right from the exercise of the trial judge's discretion in entering an interlocutory order certifying this suit as a class action under Rule 23, and there exists no conflict between the decision below and any decision of this Court or of any Circuit Court.

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[14] But see, *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975), where the Court, rather wistfully, notes that other circuit courts have held that class action certification orders are not appealable as final orders, but that the pr edents in its circuit required it, however, to apply a three-pronged test which might permit appeal from such orders in an extremely narrow range of circumstances.

[15] See the cases cited on p. 9 herein.

POINT II

Petitioner's Attempt to Have This Court Make a Factual Determination That Respondents Acted Unethically, a Determination That Would Be At Odds With the Prior Decisions of the District Court and the Court of Appeals, Is Clearly Improper.

Contrary to petitioner's assertions, the decision of the Court below does *not* raise important issues with respect to the application of law. Petitioner is vainly seeking another hearing on its charges that respondents are unethical, that they have committed professional improprieties and deceit, and the like. These charges have not been sustained either in the District Court or the Court of Appeals, as petitioner itself recognizes. See Petition For Writ of Certiorari, p. 31.

It is clear that petitioner is misusing this Court's certiorari jurisdiction in its attempt to obtain a factual determination more in accordance with its perception of respondents. Chief Justice Taft, commenting on the Supreme Court's certiorari jurisdiction said:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing". *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

Petitioner's reliance on *Kriger* v. *European Health Spa, Inc. of Milwaukee, Wis.*, 56 F.R.D. 104 (E.D.Wis. 1972); *Shields* v. *First National Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1971); *Cotchett* v. *Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972), and *Graybeal* v. *American Savings & Loan Association*, 59 F.R.D. 7 (D.D.C. 1973) [all cited on p. 26 of the Petition For Writ of Certiorari] is entirely misplaced. In these cases, the District

Court determined that, for a variety of reasons, the requirements of Rule 23 had not been satisfied and therefore denied class determination. For example, in *Cotchett,* the trial judge determined that plaintiff failed to demonstrate that issues common to the class predominate over individual questions or that the class action device was superior to other available methods of adjudication. In *Kriger* and in *Shields,* the trial judge determined that plaintiff failed to show that the class action was superior to other available methods of adjudication. In *Graybeal,* the plaintiff failed to establish that: common issues predominated over individual questions, a class action would be superior to other methods of adjudication, or that he was an adequate class representative.

Moreover, none of these cases support the petitioner's arguments that an immediate appeal as a matter of right lies from an interlocutory order of the District Court, in which as a matter of discretion, the trial judge finds that the requirements of Rule 23 had been met.

Finally, petitioner argues that it faces irreparable harm if it is not permitted to immediately appeal the class certification order determining that respondents are adequate class representatives because if respondents lose at trial other class members may challenge the res judicata effect of the judgment against them. This argument ignores that class members may freely choose whether or not to stay in the class and be bound by any judgment pro or con. But more importantly, this argument can be made with respect to *every* decision certifying a class under Rule 23 because in every such instance, the trial court is making a determination of the adequacy of representation of the class representatives, in many cases over the objections of the defendants. As we have seen all the Courts of Appeals have held that such discretionary and non-final Rule 23

determinations by the trial judge are reviewable only after final judgment. Further, the *Gonzales* decision,[16] cited by petitioner at p. 32 of its petition for writ of certiorari, rather than supporting petitioner's arguments for the right to immediate appeals from Rule 23 determinations, supports the proposition that appellate review of the adequacy of the class representation should not be made until after the conclusion of the suit. In *Gonzales,* the Court stated that:

> "We hold that the primary criterion for determining whether the class representative has adequately represented his class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. A court must view the representative's conduct of the *entire* litigation with this criterion as its guidepost." 474 F.2d at 75 (emphasis added)

In sum, petitioner has asserted no valid ground for departing from the final judgment role and permitting an immediate appeal from the interlocutory order below certifying this as a class action, and petitioner's attempt to have this Court make a factual determination that respondents have acted with impropriety, a determination contrary to the previous determinations of the District Court and the Court of Appeals, is a misuse of this Court's certiorari jurisdiction.

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[16] *Gonzales* v. *Cassidy,* 474 F.2d 67 (5th Cir. 1973).

The petition presents no question warranting review by this Court and should be denied.

Dated: New York, New York
July 6, 1976

Respectfully submitted,

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APPENDIX

(a) 28 U.S.C. § 1291 provides:

"FINAL DECISIONS OF DISTRICT COURTS—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(b) 28 U.S.C. § 1292(b) provides in relevant part:

"INTERLOCUTORY DECISIONS . . .

(a) . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . .".

(c) F.R. Civ. P. 23 provides, in relevant part:

"RULE 23. CLASS ACTIONS—(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of

all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (c) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • •

(3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1791.

ARTHUR ANDERSEN & CO.,

Petitioner,

v

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This reply brief is submitted by petitioner Arthur Andersen & Co. in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and in response to the Brief in Opposition thereto filed by respondents.

I. Respondents Misstate Petitioner's Position, as Well as the Position of the Second Circuit on the Appealability of Class Orders.

Respondents erroneously assert that it is "petitioner's theory" that this Court's decision in *Eisen IV* (417 U. S. 156 "mandates the Courts of Appeals to review *all* interlocutory class certification orders if they are immediately appealed . . ." under 28 U. S. C. § 1291 (Brief in Opposition at page 10; emphasis added). To the contrary, the Petition addresses only the holding of the Third Circuit Court of Appeals, in this and other cases, that a decision to certify a class may *never* be appealed under 28 U. S. C. § 1291 regardless of whether it meets the criteria laid down by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

Moreover, respondents erroneously imply that there is no difference between the Second and Third Circuits in the treatment afforded to class orders appealed under 28 U. S. C. § 1291. *Sanders v. Levy, et al.*, — F. 2d — (2d Cir., Nos. 743, 744, 745, June 30, 1976), reprinted as Appendix C, not only holds that a class order requiring the defendant investment company to bear the costs associated with the identification of class members was appealable under 28 U. S. C. § 1291 "because it fits squarely within the col-

lateral order doctrine of *Cohen v. Beneficial Loan Corp.*" (Appendix C, page 8), but also that it was proper to review the district court's class action ruling on the question of manageability because the order containing that ruling was properly before the Court on the issue of identification costs, and because there was sufficient "overlap" in the factors relevant to both issues to warrant the Court's exercise of plenary authority (Appendix C, page 17). Considering the identity of "overlap" between petitioner's appeal on the issue of disqualification-of-counsel and its appeal on the issue of adequacy-of-class-representation, the parallel to *Sanders* is irresistible.

II. None of the Facts Upon Which Andersen Bases Its Petition Are in Dispute.

The brief in opposition also erroneously suggests that Andersen is asking this Court to engage in the process of making factual determinations from a contested record, and that this Court should reverse findings of fact of the District Court and the Court of Appeals.

First, the Brief in Opposition does not challenge the accuracy of a single, solitary fact asserted in the Petition. This is so, of course, because the facts established are based upon the testimony of the respondents themselves and their counsel. Accordingly, the facts necessary for disposition of the issues are not in dispute—this Court may properly rely on the uncontested facts set forth in Andersen's Petition.

Second, a grant of the Petition would not require this Court to contradict any fact found either by the District Court or by the Circuit Court since both Courts avoided coming to grips with any of the factual bases underlying petitioner's appeals—the District Court by assuming (without deciding) "the impropriety of [respondents] motives

in instituting the action" (Appendix B, page A21), and the Circuit Court by refusing to review Petitioner's appeal challenging Kramer's qualifications to act as class representative and by resting its decision on appearances of impropriety in Petitioner's appeal challenging his qualifications to act as class counsel (Appendix A, pages A5, A8).

III. Conclusion.

Because the questions presented herein are collateral to the merits and of grave and immediate importance to the bar and judiciary alike, Andersen's Petition should be granted.

July 23, 1976.

Respectfully submitted,

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APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 743, 744, 745—September Term, 1975.

(Argued May 5, 1976 Decided June 30, 1976.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,
Plaintiff-Appellee,

—against—

LEON LEVY, et al.,
Defendants-Appellants.

EGON TAUSSIG,
Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, et al.,
Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs-Appellees,

—against—

ERIC HAUSER, et al.,
Defendants-Appellants.

Before:

HAYS and MULLIGAN, *Circuit Judges,* and
PALMIERI, *District Judge.* *

* Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

Appeal from an order of the Hon. Thomas F. Griesa, *Judge,* United States District Court for the Southern District of New York, holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing that the defendant mutual investment fund bear substantial costs of extracting the names and addresses of the class members from computer tapes.

Affirmed as to class action designation. Reversed as to allocation of identification costs.

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DONALD N. RUBY, New York, New York (Wolf Popper Ross Wolf & Jones, New York, New York, Robert Kornreich, of Counsel), *for Plaintiffs-Appellees.*

PALMIERI, *D. J.:*

Plaintiffs-appellees (plaintiffs) seek to maintain this action on behalf of certain present and former stock-

holders of Oppenheimer Fund, Inc. (the Fund), an investment company registered under the Investment Company Act of 1940, 15 U. S. C. § 80a-1 *et seq.* This is an appeal under 28 U. S. C. § 1291 from an interlocutory order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing the defendant-appellant (defendant) Fund to bear substantial costs in identifying the names and addresses of the class members so that plaintiffs can send them the initial notice of the pending action as required by Rule 23(c)(2), Fed. R. Civ. P.

When the motion for class determination was made, there were over 67 million shares of the Fund outstanding held by approximately 173,000 shareholders. Of the approximately 121,000 present or former shareholders who constitute the class designated by the plaintiffs, about 103,000 remain shareholders and 18,000 have sold their shares. The information needed by plaintiffs for the preparation of the notice to the members of the class, particularly the names and addresses of the class members, is contained in magnetic computer tapes kept by the transfer agent of the Fund. The extraction of this information from the tapes would require, in addition to the usual processing, the design of new computer programs. The cost of accomplishing this task was estimated by the transfer agent to be $16,580 as of October 10, 1973.

On each of the issues presented, identification costs and designation as a manageable class action, we must first decide if the issue is reviewable on appeal and, if so, then determine if the district court's decision should be upheld. Since we find that our treatment of the identification costs matter affects the designation question, we discuss the identification costs matter first.

The Allocation of Identification Costs

The order requiring the Fund to bear the identification costs is appealable because it fits squarely within the collateral order doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541 (1949). The requirements of that doctrine are essentially twofold: first, the decision appealed from must not be "tentative, informal or incomplete," 337 U. S. at 546, but rather it must conclusively settle a party's claim; second, the decision must involve a collateral matter that can be reviewed apart from the merits of the case but which cannot be effectively reviewed on appeal from the final judgment. In *Eisen v. Carlisle & Jacquelin (Eisen IV)*, 417 U. S. 156 (1974), the Supreme Court faced the question whether this court had jurisdiction in *Eisen v. Carlisle & Jacquelin (Eisen III)*, 479 F. 2d 1005 (2d Cir. 1973) when we reviewed the district court's order imposing notice costs on the defendants. The Supreme Court decided that the order was appealable because it was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" 417 U. S. at 172, *quoting Cohen, supra*, 337 U. S. at 546-47. *See also, General Motors Corp. v. City of New York*, 501 F. 2d 639, 647 (2d Cir. 1974). We find this question of appealability controlled by *Eisen IV*.

We turn next to the merits of the order allocating identification costs. Rule 23(c)(2), Fed. R. Civ. P., provides in relevant part:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Since this is a class action brought under subdivision (b)(3) of the rule, namely, one in which the court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that the class action was superior to other available methods, individual notice of the action must be sent to all class members who can be identified by name and address through a reasonable effort. *Eisen IV*, 417 U. S. at 173-77. The cost of such notice must be borne in the first instance by plaintiff. *Id.*, 417 U. S. at 177-79; *Eisen III*, 479 F. 2d 1005, 1009 (2d Cir. 1973); *Eisen II*, 391 F. 2d 555, 568 (2d Cir. 1968). The authorities just cited enunciate the views of the Supreme Court and this court that, absent special circumstances, if the plaintiff does not accept this expense, the class action cannot be maintained. In the usual case, defendants may not be compelled to provide financial support for a class action against themselves.

> Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as a part of the ordinary burden of financing his own suit.

Eisen IV, 417 U. S. at 178-79.

The possibility that plaintiff may not be required to defray the cost of notice is still an open question in some cases. The Supreme Court declined to foreclose the possibility in "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Eisen IV, supra*, 417 U. S. at 178. In addition to the derivative suit, we have suggested that there may be other similar cases in which justification might be found for holding that a representative plaintiff is not obligated to defray the cost of notice, citing "a case

where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund." *Eisen III*, 479 F. 2d 1005, 1009 n. 5 (2d Cir. 1973). The district judge does not appear to have pursued this line of analysis and the plaintiffs have mentioned it only in passing.

Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we do not think this is such a case. The defendant Fund is not a public service monopoly with the responsibilities incumbent upon such an entity, and no finding of liability has yet been entered against it. The Supreme Court in *Eisen IV* did not attempt to elucidate the exceptional case in which a representative plaintiff might be relieved of this burden. Indeed, it did not unequivocally state that there was such a case. It did speak of the shareholder derivative suit but that apparently was by way of analogy since the derivative suit is not a class action, though possibly akin thereto.[1] The Supreme Court also described *Eisen IV* as a case where "the relationship between the parties is truly adversary." 417 U. S. at 178. Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery. The equities in favor of imposing some costs on the corporation in that situation are obvious. But the Supreme Court more likely had in mind an arms-length relationship unencumbered by fiduciary duties. The relationship between the plaintiffs and the Fund is probably not "truly adversary" in the *Eisen IV*

1. See *Developments in the Law, Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 943 (1958); Meyer, *The Social Utility of Class Actions*, 42 BROOKLYN L. REV. 189, 190-91 (1975).

sense. Although the Fund is not in the position of the corporation in a derivative suit,[2] we may assume it had fiduciary duties to the purchases of its shares. See *Dolgow v. Andersen*, 43 F. R. D. 472, 498-99 (E. D. N. Y. 1968). But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the *Eisen IV* rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims.[3] No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it.

Furthermore, we do not think these costs could properly be imposed on the other defendants. Even if we assume that these defendants—the directors of the Fund, its manager, and the firm that controlled the manager—

2. Each of the three consolidated suits contains two counts—one a derivative and one a class action. The order on appeal deals only with the latter, and we are not here concerned with the derivative claims. Furthermore, the Fund would not directly benefit from a recovery by the plaintiffs.

3. The dissent apparently overlooks the fact that the costs were imposed on the Fund which is not a party to the class action claims. *Eisen IV*, *supra* at 178, makes an exception to the usual rule that the representative plaintiff must bear the cost of notice "where a fiduciary duty pre-existed between the *plaintiff* and *defendant* . . ." (emphasis added). We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders.

had fiduciary duties to the plaintiff shareholders, that would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case. Many of the considerations pointed to in justification for shifting the costs, see *Dolgow v. Andorsen, supra,* 43 F. R. D. at 498-500; *Eisen v. Carlisle & Jacquelin,* 52 F. R. D. 253, 264-70 (S. D. N. Y. 1971), have been shown to be inappropriate. The district court may not weigh the merits and cite the strength of a plaintiff's case as justification.[4] The result in *Eisen IV* leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight. The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous expenses of litigation. *Eisen III, supra,* 479 F. 2d at 1019. Even the contention that the defendant has an interest in obtaining the effects of res judicata against all members of the class often rings untrue. If the class action proceeds, the defendant may pay large sums in defending claims that might not otherwise have been

4. We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Eisen IV, supra, 417 U. S. at 177. We have stated the matter more broadly:

> But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.

Eisen III, supra, 479 F. 2d at 1015.

brought due to the limited interest of the individual plaintiffs.[5] In sum, we perceive no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants. We have suggested before that the vindication of valid class claims not maintainable under Rule 23(b)(3) or otherwise is a matter for Congress. *Eisen III,* 479 F. 2d at 1019.

The justification that the district court found for imposing some costs on the defendant Fund was twofold. First, it found the expense was "relatively modest," apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen IV.* The second reason given was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." This bears some analysis. Plaintiffs defined the class as all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970. Discovery then revealed that this class consisted of approximately 121,000 persons, 103,000 of whom were still Fund shareholders, and that the cost of the required computer operations to extract the names and addresses of the class members from the lists of past and present Fund shareholders would be approximately $16,580. Plaintiffs then sought to redefine the class to exclude the 18,000 persons included in the original class who no longer hold Fund shares, and to send the required notice by inserting it in a regular mailing to all present Fund shareholders. The defendants objected to the exclusion of the 18,000 persons, presum-

5. *See* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139, 155 (1969). This is true of the instant case where the interests of the class members are said to range from $2.00 to $24.00.

ably because it would limit the res judicata effect of the suit. The district court reached the same conclusion but for a different reason, holding that these persons could not be excluded because to do so "would involve an arbitrary reduction in the class." [6] The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct.

The defendants also opposed sending the notice to the 68,000 shareholders who are not class members, expressing concern that such a mailing could lower investor confidence and trigger a wave of redemptions. The district court did not pass on the validity of this concern; it merely noted that the concern was obviated by having the defendant cull the non-members from the lists. However, there is evidence in the record to substantiate the concern. Plaintiffs assert that the Fund shareholders have been advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports. But we think that notice of that type—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denial of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct. In these circumstances, we think that the defendants concern was legitimate and the district court

6. The court found: "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

could not properly condition its abatement on defendants' shouldering of the notice costs. The identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants.

Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. They further suggest that identification costs are akin to the expense borne in discovery which a district judge may in his discretion require a party to bear unless the party can show that it is unreasonable and oppressive, citing, *inter alia,* 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2218 at 659 (1970), and 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 (2d ed. 1975). However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes. Moreover, if the rules of discovery were applicable, it appears unlikely that they would require that defendants bear the identification costs here. Rule 33(c), Fed. R. Civ. P., designed to protect parties from burdensome interrogatories, provides:

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or

> ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Under this rule, a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery. *See* 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 at 33-103 (2d ed. 1975); *Tytel v. Richardson-Merrell, Inc.*, 37 F. R. D. 351 (S. D. N. Y. 1965); *Konczakowski v. Paramount Pictures, Inc.*, 20 F. R. D. 588 (S. D. N. Y. 1957). If the discoverer should proceed under one of the other rules governing discovery, the respondent could obtain a protective order under Rule 26(c) from "undue burden or expense." Nevertheless, we do not rely on this point since we find the discovery rules inapplicable.[7]

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7. Our dissenting Brother sees Rule 34 as "more specifically designed to govern computerized information." This rule addresses itself to the production of data compilations for inspection or copying, not to the sorting or analysis of the data. Although the rule provides that the data compilation may be "translated, if necessary, by the respondent through detection devices into reasonably usable form," the concern appears to focus on putting the data into a form intelligible to the discoverer so he can then study or employ it. As the Advisory Committee Note to the 1970 amendment states,

> "[W]hen the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a *print-out* of computer data."

48 F. R. D. at 527 (emphasis added). The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If "sophisticated electronic manipulation and analysis" becomes necessary, "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970).

We turn next to the designation of the suit as a class action. The determination of the district court that the action met the requirements of Rule 23(b)(3) was discretionary. It is not appealable under the collateral order doctrine. In seeking to arrive at some standards by which to determine the appealability of such an order, we have developed a three-pronged test as set forth in *Herbst v. International Telephone & Telegraph Corp.*, 495 F. 2d 1308, 1312 (2d Cir. 1974), and refined in *Kohn v. Royall, Koegel & Wells*, 496 F. 2d 1094 (2d Cir. 1974), *General Motors Corp. v. City of New York*, 501 F. 2d 639 (2d Cir. 1974) and, most recently, in *Parkinson v. April Industries Inc.*, 520 F. 2d 650 (2d Cir. 1975). *See also, Handwerger v. Ginsberg*, 519 F. 2d 1339 (2d Cir. 1975). In *Parkinson*, we recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would exceptions to the final judgment rule be permitted. 520 F. 2d at 657-58. Although it may be a close question whether that three-prong test is satisfied here, we do not decide that question. We think we may properly review the class action designation because the order in which it was made is properly before us on another ground. Judge Friendly, in his concurrence in *Parkinson, supra*, 520 F. 2d at 660, suggested that this exception should be made even if appeals from the grant or denial of class action designation are allowed only under the certification procedures of 28 U. S. C. § 1292(b). There is sufficient overlap in the factors relevant to both issues to warrant our exercising plenary authority over this appeal. *Eisen IV, supra*, 417 U. S. at 172; *Hurwitz v. Directors Guild of America, Inc.*, 364 F. 2d 67 (2d Cir.), *cert. denied*, 385 U. S. 971 (1966). *See San Filippo v. United Bhd. of Carpenters & Joiners*, 525 F. 2d 508 (2d Cir. 1975); *General Motors Corp. v. City of New York*, 501 F. 2d 639, 648

(2d Cir. 1974); 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 272-73 (2d ed. 1975).

Turning to the merits of the class action designation we find that the granting of class action status was proper. As Judge Griesa found, the requisite numerousness is present and common questions of law and fact predominate over any questions affecting only the individual members of the class. Moreover, we cannot, at this stage of the litigation, support defendants' claim of unmanageability. They contend that proof of liability and damages "may well involve millions of individual computations," and that the aggregate damages sustained by the class may not be as great as plaintiffs claim. Nevertheless, the district judge is in the best position to make a determination of manageability and has considerable discretion in doing so. Modern computer technology can bring formerly insurmountable tasks within the range of manageability. If, on the other hand, unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the district judge can reassess the procedures to be employed and can even reconsider the class action designation. *Parkinson v. April Industries, Inc., supra,* 520 F. 2d at 653; *General Motors Corp. v. City of New York, supra,* 501 F. 2d at 647; *Green v. Wolf Corp.,* 406 F. 2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U. S. 977 (1969); Rule 23(c)(1), Fed. R. Civ. P. Judge Griesa specifically noted that his determination was a provisional one.

Accordingly, we affirm the provisional designation of the suit as a class action but reverse the order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

HAYS, *Circuit Judge* (dissenting in part):

I concur in the majority's holding that the order below is appealable and the granting of class action status proper. I respectfully dissent, however, from the reversal of the district court order directing defendant Oppenheimer Fund, Inc. ("the Fund") to cull out the names of class members from the Fund's computer tapes at the Fund's expense. The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin (Eisen IV),* 417 U. S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationship between the parties herein. An elaboration of the particular facts attending this suit is fundamental to understanding the nature of the action and my disagreement with the panel's holding.

Defendant Fund is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1 *et seq.* Defendant Oppenheimer Management Corporation ("the Manager") manages the Fund's investment portfolio and, pursuant to an Investment Advisory Agreement, receives compensation calculated as a percentage of the Fund's net asset value. Defendant Oppenheimer & Co. ("the Broker") is a brokerage firm owning approximately 82% of the outstanding stock of the Manager and 100% of the voting stock. The individual defendants are all directors of the Fund, some of whom also hold offices or directorships or partnership interests in the Manager and/or Broker. The Manager has the right to act as exclusive distributor and sole principle underwriter of Fund shares. Shares are sold to the public at a price equal to net asset value plus a sales charge.

This consolidated suit involves stockholder derivative and class action claims. The class, as certified by the dis-

trict court, is composed of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. The complaint alleges that the defendants violated the federal securities laws by failing to disclose material information to investors. The gravamen of the damage claims is that restricted securities purchased by the Fund were overvalued and, consequently, the net asset value of the Fund was overstated. Overstatement of net asset value, in turn, caused an overvaluation of Fund shares being sold to the public during the relevant period and, because the Fund-Manager fee arrangement was geared to net asset value, caused the Fund to pay inflated fees to the Manager.

As the majority apparently recognizes, the Supreme Court's *Eisen IV* decision is not dispositive of the issue of the allocation of costs of identification in the context herein. *Eisen IV* construed the *notice* requirements of Rule 23(c)(2), which apply to class actions maintained under Rule 23(b)(3), in the context of a case wherein "the relationship between the parties is truly adversary," *Eisen IV, supra* at 178-79, and held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178. In the instant case, in contrast, we deal not with notice costs—a burden plaintiffs herein willingly assume—but with class member identification costs, and we deal not with the usual rule applicable to truly adversarial relationships, but with a rule as to which the Supreme Court took pains to express no opinion—the rule which governs in "situations where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Id.* Both of these distinctions merit pause before we rush to close yet another door to the class action procedure.

In *Eisen IV* the Supreme Court held that in a Rule 23(b)(3) class action the cost of notice, *i.e.*, the letter, envelope, stuffing, and postage is, in the usual case, the

responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra* at 179. The opinion properly construed requires only that the litigation expense of notice be borne by plaintiff. It does not require, and surely the Supreme Court did not intend, that *all* litigation expenses, contrary to established rules and practice, are to be hereinafter the plaintiff's responsibility. When identification is sought information allowing a party to proceed with his suit is at the core of the request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery.

Rule 34 governs the production of computerized information, making discoverable, *inter alia*, "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."[1] As noted by S. C. Wright and A. Miller, Federal Practice and Procedure § 2218 at 659 (1970):

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to

1. It is somewhat disingenuous to focus, as the majority does, on Rule 33 which governs interrogatories rather than the Rule more specifically designed to govern computerized information. Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny.

> the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.'" (footnote omitted)

While the authors suggest that courts should be sensitive to the expense involved since the disclosing party may be obliged "to engage in fairly sophisticated electronic manipulation and analysis," *id.*, expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an "undue burden or expense." It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker v. F&F Investment*, 470 F. 2d 778 (2d Cir. 1972), *cert. denied*, 411 U. S. 966 (1973); *H. L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F. 2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, *cf. Eisen IV*, *supra* at 179, n. 16, did not commit reversible error in refusing to shift this burden to plaintiffs. Moreover, the order below specifically notes that it is "without prejudice to the right of this defendant [the Fund], at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party."

Assuming, *arguendo*, that the majority is correct in failing to distinguish identification from notice, reversal of the district order is neither compelled by *Eisen IV* nor an advisable extension of that case. As we noted in *Eisen*

v. Carlisle & Jacquelin, 470 F. 2d 1005, 1009 n. 5 (2d Cir. 1973) [2] *("Eisen III")* and the Supreme Court noted in *Eisen IV*, the usual rule that the representative plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Eisen IV*, *supra* at 178. The instant appeal squarely raises the issue, heretofore undecided, of whether notice costs may properly be imposed upon a defendant when the relationship of the parties is truly fiduciary. I would hold that they may.

Unquestionably the relationship between Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act "impose[s] fiduciary obligations of the highest order upon persons who control investment companies." *Securities and Exchange Commission v. Advance Growth Capital Corp.*, 470 F. 2d 40, 55 n. 21 (7th Cir. 1972). *See*, Invest-

2. The footnote, in pertinent part, states:

"Nor did we decide or intend to say [in *Eisen II*, 391 F. 2d 555 (2d Cir. 1968)] that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F. R. D. 69, 107."

ment Company Act of 1940, 15 U. S. C. § 80a-35. So too, "[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. . . .'" *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit.

When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty. Thus, as the majority notes, the Supreme Court in *Eisen* "refused to foreclose the possibility" of allocating notice costs where there exists a fiduciary duty between the parties and their relationship is not truly adversarial. Absent such a special relationship and without support under Rule 23, the Supreme Court found no justification for deviating from the usual rule that a plaintiff must bear notice costs. In cases involving fiduciaries, however, the usual rules traditionally have been modified to insure that the trust relationship is not abused. The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress. I would affirm the district court.